

GOVERNMENT
OF
THE DISTRICT OF COLUMBIA

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BOARD OF ZONING ADJUSTMENT

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PUBLIC HEARING

+ + + + +

TUESDAY

JULY 12, 2005

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The Public Hearing convened in Room 220 South, 441 4th Street, N.W., Washington, DC 20001, pursuant to notice at 9:30 a.m., Geoffrey H. Griffis, Chairperson, presiding.

BOARD OF ZONING ADJUSTMENT MEMBERS PRESENT:

GEOFFREY H. GRIFFIS	Chairperson
RUTHANNE MILLER	Vice-Chairperson
JOHN A. MANN, II	Board Member (NCPC)

ZONING COMMISSION MEMBER PRESENT:

ANTHONY HOOD	Vice-Chairperson
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OFFICE OF ZONING STAFF PRESENT:

CLIFFORD MOY	Secretary
BEVERLEY BAILEY	Zoning Specialist

D.C. OFFICE OF THE ATTORNEY GENERAL:

SHERRY GLAZER, ESQ.

OFFICE OF PLANNING STAFF PRESENT:

MAXINE BROWN-ROBERTS
STEPHEN MORDFIN

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This transcript constitutes the minutes
from public hearing held on July 12, 2005.

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P-R-O-C-E-E-D-I-N-G-S

9:42 a.m.

CHAIRPERSON GRIFFIS: Good morning, ladies and gentlemen. Let me call to order our special public meeting of the 12th of July, 2005. We do, as you have possibly seen our schedule, have a special public meeting, which means we will be discussing a case that has already been heard before the Board.

So let me just make a brief, opening introductions and then I will go through a full opening as we call to order our hearing.

My name is Geoff Griffis, I am Chairman of the Board of Zoning Adjustment in the District of Columbia, and that is what you are before.

Joining me today is Vice Chair, Ms. Miller, and representing the National Capital Planning Commission, with us is Mr. Mann. Representing the Zoning Commission, with our cases this morning, not on this decision, however, is Mr. Hood, sitting to my right.

As I've indicated, copies of today's hearing schedule are available for you. I'm going to ask that people turn off their cell phones and beepers at this time, as we are broadcasting and recording all

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proceedings before the Board of Zoning Adjustment.

I will go into greater detail as I open the hearing, however, for purposes of the record this morning, please note that we have a Court Reporter sitting to my right, on the floor, who is creating the official transcript.

We are also being broadcast live on the Office of Zoning's website. So, attendant to several things, we will need to make sure that those transmissions go through unimpeded.

Let me say a very good morning to Ms. Bailey, who sits on my very far right, with the Office of Zoning, and also Mr. Moy with the Office of Zoning, closer to me. Mr. Moy, why don't we call the first case for the special public meeting this morning.

MR. MOY: Yes, sir, good morning, Mr. Chairman and members of the Board. The first case is, and only case for the special public meeting, is Application Number 17313 of Edward Ertel and Jennifer Squires, pursuant to 11 DCMR 3103.2, for a variance from the lot occupancy requirements under Section 403, and a variance from the non-conforming structure provisions under Subsection 2001.3, to allow an addition to a single-family row dwelling, in the R-4

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District at premises 924 G Street, S.E., that's in Square 949, Lot 33.

On May 3rd, 2005, the Board convened its special public meeting to decide this application. After deliberation, the Board decided to postpone it's decision to September 13th, 2005, to allow the Applicant time for the HPRB to review the project at HPRB's May, 2005 hearing.

In addition, the Board also decided that it would schedule an earlier special public meeting, if and when the HPRB were to meet and decide on the project before September, including any additional filings on the part of the Applicant because of HPRB's decision.

June 29th, 2005, the Applicant filed a revised proposal, which is identified in your case folder as Exhibit 29. According to the Applicant, they have met with HPRB at their May 26th, 2005, meeting.

The Applicant's have decided to construct a one-story sunroom addition, instead of the originally proposed two-story addition. Finally, staff would conclude by saying that the Applicant hasn't filed any revised drawings showing the new one-story sunroom

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addition, and would advise, perhaps, that until that is submitted, the Board stay with its original decision being of September 13th.

And that completes the staff's briefing, Mr. Chairman.

CHAIRPERSON GRIFFIS: Excellent, thank you very much, Mr. Moy. Is the Applicant present today in Application 17313? Are they in the Hearing Room?

(No response.)

CHAIRPERSON GRIFFIS: Noting that they are not in the Hearing Room, we had made special provisions in calling this earlier than what we had announced, in terms of the 13 September, if they were, in fact, ready, Mr. Moy.

I think it is well said that they have been through HPRB. Let me step back a second and I think we have gone to that length because we didn't want to make it so encumbering and convoluted in terms of going back and forth between review bodies.

But it was fairly clear in this case that the work that was being proposed was of such a nature of which Historic Preservation Review was an integral and effective part of what we would have to look at.

And, in fact, I think that comes to bear

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true. And that, I would suggest, that we would not decide this today, based on the fact that we don't have plans that we can actually evaluate in terms of the specific requirements or relief required for the zoning regulations. Additionally, I think it might be well said, as Ms. Miller has mentioned in Executive Session, that we allow the record to stay open if there is change in the specifics of the relief that was previously announced.

Meaning, if nothing has changed in terms of the type of relief, but perhaps it has been impacted or affected in terms of its percentage for square footage, that we would leave it open for submissions on that, and we could move ahead in our decision-making.

But hold it for the 13th of September. I don't think we could make it into July for another special public meeting, because of the announcement requirements and notice requirements, so I think it's just as well to put it to our first public meeting on the 13th of September.

Now I'll open up the record for others to comment. Ms. Miller.

VICE CHAIR MILLER: I just also want to add,

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with respect to leaving the record open for the Applicant to address the variance test, if it's changed in any way.

Because I think we were presented before with a two-story addition in order to address certain practical difficulties of the Applicant, and now it appears that we will be presented with a one-story addition, and therefore the Applicant may want to address how that would meet his needs.

CHAIRPERSON GRIFFIS: Good. However, I just wanted to be clear, because if there are other affects of relief that are required, I'm not sure that we would take it just on the narrative, and add in variances to this.

So hopefully, it's not changed in terms of variances and lot occupancy and addition of nonconforming structures. Okay, anybody else? Mr. Mann, in agreement, then?

MEMBER MANN: I concur.

CHAIRPERSON GRIFFIS: Excellent. Then with the acceptance of the Board to the three members participating this morning set this off until the 15th, again, Mr. Moy. Good, is there any other business for the special public meeting, this morning?

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MR. MOY: No, sir.

CHAIRPERSON GRIFFIS: Very well, then let's adjourn the special public meeting and call to order our July 12th, 2005, public hearing of the Board of Zoning Adjustments to the District of Columbia. I am, in fact still, Geoff Griffis, and I am Chair of the Board of Zoning Adjustments. This morning with me is the Vice Chair Ms. Miller.

Representing the National Capital Planning Commission is Mr. Mann, and representing the Zoning Commission is Mr. Hood. Our other esteemed colleague and member has been called out of town on a business emergency and will not be participating this morning.

Copies of today's hearing agenda are available for you. Please pick it up, you can see where you will be called on our schedule this morning, as we get into our hearing.

As I said previously, it's important to understand that we would ask that everyone please refrain from making any disruptive noises or actions in the hearing room. Please turn off your cell phones and beepers.

It is very important for two respects, or in two respects. First, all proceedings before the Board

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of Zoning Adjustment are recorded. They are recorded, most importantly, by the Recorder who is sitting on the floor to my right.

That is the official transcript which becomes an official part of the record. We are also being broadcast live on the Office of Zoning's website. By not having cell phones and beepers, ringing and beeping and being disruptive, of course, those at home that are enjoying our broadcast can enjoy it with good transmission.

But most importantly it is for those who are going to be providing testimony that we don't have a disrupted environment while they provide very important fact testimony for the Board to take under its consideration for decisions.

Prior to coming forward, I'm going to ask that people fill out witness cards. Witness cards are available for you where you entered into the hearing room, they are also available at the table where you will provide testimony in front of us.

Those two witness cards go to the Court Reporter prior to coming forward. When you are going to present testimony to the Board, you can just have a seat, and I will need you to state your name and

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address for the record, just once.

Obviously, that is to make sure that you are correctly noted on the transcript and any other recordings. The order of procedure for special exceptions and variances is as follows.

First, we hear from the Applicant their case presentation, all the detailed facts that relate directly to the zoning relief that is being sought. Secondly, we will hear any Government reports attendant to that application.

Analysis from Office of Planning, Department of Transportation are types of Government agency reports. Third, we will hear from the Advisory Neighborhood Commission within which the property is located.

Fourth, we'll hear persons or parties in support of the application. Fifth, would be persons or parties in opposition to the application, and sixth, finally we give another chance for the Applicant to provide closing remarks, summations and/or rebuttal testimony, if required.

Cross examination of witnesses is permitted by the Applicant and the parties in a case. The ANC within which the property is located is automatically

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a party in the case and therefore, obviously, will be able to participate in cross examination.

Nothing prohibits this Board from limiting the time or the matter of which cross examination is conducted, and we will be specific and direct in terms of keeping cross examination on point, and that is in the relevancy of the application that we will be hearing today.

The record will be closed at the conclusion of each hearing on each case, except for any material that is specifically requested by the Board. And we will be very specific of what is to be submitted into the record and when it is to be submitted into the record.

It should be understood, when we conclude a hearing, the record is closed, except for those materials of which we keep the record open for. So, anything you think that is critical for the Board's decision, in terms of the relevancy of the zoning relief that's required, should be either submitted today in writing or given in oral testimony.

The Sunshine Act requires that this Board conduct its hearings in the open and before the public. This Board does enter into Executive Session

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both during and after hearings on a case.

This is in accordance with the Sunshine Act.

It is also in accordance with our rules, regulations and procedures. The decision of this Board in contested cases must be based exclusively on the information that is created before us today, exclusively on the record that will be before us.

That's why it's so important to make sure that those testimony and facts are put into the record. Let me ask, oh, and let me just say again, a very good morning to Ms. Bailey from the Office of Zoning.

Mr. Moy has left us briefly, but will be back, and Ms. Glazer, in between the two, on my right, is representing the Office of Attorney General. I'm going to have Ms. Bailey swear you all in.

So, any individuals that are here, present today, that are going to or anticipating providing testimony, I would ask that you please stand and give your attention to Ms. Bailey.

(Witnesses are sworn.)

CHAIRPERSON GRIFFIS: I thank you all very much. At this point we can consider any preliminary matters. Preliminary matters are those which relate

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to whether a case will or should be heard today.

Requests for postponements, continuance, or whether proper and adequate notice is provided, are elements of preliminary matters. Let me say, Ms. Bailey, again, a very good morning. Are you aware of any preliminary matters for the Board's attention at this time?

MS. BAILEY: Mr. Chairman and to everyone, good morning. There are, Mr. Chairman, however, they are case specifics, so, with that, I have none at this point.

CHAIRPERSON GRIFFIS: Excellent. Is anyone present have a preliminary matter, they can come forward and have a seat at the table and we will take it up at that time. Good morning, Mr. Nunley.

MR. NUNLEY: Good morning, Chairman Griffis, Board Members and Staff. I'm Edgar Nunley, my address is 4707 Brinkley Road in Temple Hills, Maryland 20748.

We're here with Case Number 17349, I believe it's first on the docket, and our attorney, John Farmer, had a family emergency and was unable to be here today, so this task fell to me.

We are asking for a postponement. The record is not complete. We had a meeting with the

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Office of Planning, they had asked us for some additional information that I was unable to provide before the meeting.

I do have one of the pieces, the, oh, what is this, the Capital Survey Plat showing the exact location of the existing walls and their dimensions. But we won't be able to get the Topographic Site Plan until later on, either this week or the first of next week.

CHAIRPERSON GRIFFIS: Is it a critical part of your case presentation?

MR. NUNLEY: Absolutely. That's what we want the Office of Planning to weigh in.

CHAIRPERSON GRIFFIS: I see, okay. And who's with you?

MR. NUNLEY: This is the owner, Mr. Michael Taylor.

MR. TAYLOR: Yes, sir, good morning. My name is Michael Taylor and my address is 6919 6th Street, N.W., Washington, D.C.

CHAIRPERSON GRIFFIS: Okay. Well, here you are at the table. Why don't we call the case, and then we'll take this up as a preliminary matter and a motion to postpone.

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But what I want to do is get through, Mr. Nunley, if it's, and you can comment on this. We obviously have a request for party status in this. I think it would be appropriate to set that and then they can weigh in. Is the ANC represented today? Is the ANC representative - in deed.

So ANC-4-D is also here, so Ms. Bailey, if you wouldn't mind, why don't we call the case. Mr. Nunley you can stay where you are.

MS. BAILEY: Application Number 17349 of Michael Taylor, pursuant to 11 DCMR 3104.1 for special a exception to allow a rear addition to an existing, single-family, detached dwelling under Section 223, not meeting the lot occupancy requirements, side yard requirements and nonconforming structure provisions.

The property is located at 6919 6th Street, N.W. It is zoned R-1-B and is also known as Square 3191, Lots 19 and 811.

CHAIRPERSON GRIFFIS: Okay. Mr. Nunley, you're going to be representing the Applicant, is that correct?

MR. NUNLEY: Yes.

CHAIRPERSON GRIFFIS: Okay, and just a quick clarification, you mentioned that the attorney was not

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present or was called out of town.

MR. NUNLEY: Right, John Farmer is also working this case -

CHAIRPERSON GRIFFIS: Oh, that's fine.

MR. NUNLEY: - but he had family matters, his mother had an operation last night, so he's at the hospital with her.

CHAIRPERSON GRIFFIS: I'm sorry to hear that.

MR. NUNLEY: Yeah, we -

CHAIRPERSON GRIFFIS: But you're perfectly capable of running this one through, are you not, Mr. Nunley?

MR. NUNLEY: I would prefer to have his assistance, of course.

CHAIRPERSON GRIFFIS: Feeling the heat of all those people sitting behind you.

MR. NUNLEY: Right, absolutely.

CHAIRPERSON GRIFFIS: Okay. Well, that being said, let's move right into this. Mr. Nunley, have you had a chance to review our Exhibit 29, which is the request for party status?

MR. NUNLEY: Yes, I have.

CHAIRPERSON GRIFFIS: Okay. Board members, I know we have all read it, it seems fairly clear, Mr.

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Nunley. I'll let you respond to it, if you need.

MR. NUNLEY: My only concern is that a number of the people listed as property owners, as part of the organization, are not, in fact, owners of the properties. They may be tenants, but they aren't listed as owners on the tax records.

CHAIRPERSON GRIFFIS: Okay. Anything else?

MR. NUNLEY: No, that's it at this point.

CHAIRPERSON GRIFFIS: Okay. Ms. Ferster, are you present? Would you mind coming up?

MS. FERSTER: Good morning.

CHAIRPERSON GRIFFIS: If you wouldn't mind just introducing yourself for the record.

MS. FERSTER: Andrea Ferster, I'm counsel for neighbors of Square 3191 and the individual homeowners who have requested party status.

CHAIRPERSON GRIFFIS: Okay, and you're representing the friends and neighbors, correct? And that's the party that's requesting status, is that right?

MS. FERSTER: That's correct, as well as the individual neighbors, but they -

CHAIRPERSON GRIFFIS: Well, what does that mean, as well as? We have one request for party

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status, correct?

MS. FERSTER: No, there are approximately 17 neighbors who have requested individual party status, who live within 200 feet of the property, but they are not, they're, I'm representing all of them and they are prepared to present a collective case in opposition.

CHAIRPERSON GRIFFIS: So, I'm missing something, perhaps not enough coffee this morning. What's the point of having 17 individuals that are represented by a single person that are co-joining on one case presentation?

It seems to me you're clearly defining one party request.

MS. FERSTER: Neighbors of Square 3191 is simply an informal association that came together -

CHAIRPERSON GRIFFIS: Sure.

MS. FERSTER: - around this project, and so individual neighbors felt, for purposes of their standing, that they would like to join as individual parties, but again, they are not presenting a, not asking for separate cross examination -

CHAIRPERSON GRIFFIS: Do you have any major objection for us entertaining this as one single party

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request and taking it up as friends and neighbors? It certainly wouldn't impact their standing in any way, and it certainly doesn't impact our case presentation is what you just said?

MS. FERSTER: Let me confer with my clients.

CHAIRPERSON GRIFFIS: Excellent, take a moment. Yes.

MS. FERSTER: They have no objection.

CHAIRPERSON GRIFFIS: Excellent, okay. Then do we have any other clarifications from the Board, questions, Ms. Ferster, for a representative party? Does the ANC have any comment on granting or denying the party status at this time, 4-B?

(No response.)

CHAIRPERSON GRIFFIS: Noting a non-verbal no, no comment, I'll put that on the record for you and then we'll introduce you later, when we get all rolling here.

Okay. Then, Board Members, let me open it up for deliberation, comments?

MR. HOOD: Mr. Chairman, just a question for clarification. The name of this party, if approved, will be Friends and Neighbors of Square 3191, is that

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CHAIRPERSON GRIFFIS: That's my understanding, Ms. Ferster, is that correct?

MS. FERSTER: I believe it's simply Neighbors of Square 3191.

MR. HOOD: Neighbors of Square 3191.

CHAIRPERSON GRIFFIS: Okay.

MR. HOOD: Thank you.

CHAIRPERSON GRIFFIS: Or NOS 3191. Good enough.

MS. FERSTER: No, I'm sorry, it is Friends and Neighbors, I'm sorry. Friends and Neighbors, yes.

CHAIRPERSON GRIFFIS: FNOS?

MS. FERSTER: Yes.

CHAIRPERSON GRIFFIS: Okay, any other questions, clarifications? We've noted a comment by Mr. Nunley regarding the authenticity of ownership. Of course, that doesn't go to a threshold test of granting party status or not.

I think it's very persuasive and I would support granting the party status of Friends and Neighbors of Square 3191 as they are one in proximity to have evidence in this submission.

The potential impact, if this was to be

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granted, it certainly is appropriate in terms of the special exception for them to be represented as a party. Let me hear from others? Is there any objection?

(No response.)

CHAIRPERSON GRIFFIS: Not noting any objection, then I think we can move ahead and grant party status to Friends and Neighbors of Square 3191.

Okay, very well. Mr. Nunley, we should bring up your now motion for continuance on this.

If I could have the ANC Representative up at the table so we could get a quick comment and have them introduced for the record for ANC-4-B.

Ms. Ferster, I'll let you respond briefly to the motion for postponement based on the fact of additional documentation is required for further analysis with the Government agencies responding to this.

MS. FERSTER: Yes, thank you. Friends and Neighbors of Square 3191, opposes the postponement request and we have three reasons for opposing that request.

The first reason is we don't feel that there is good cause for the postponement at this point. The

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regulations, under Section 223.2, make very clear that a special exception requires a submission of adequate graphic representation and plans depicting the lot that's the subject of the application.

CHAIRPERSON GRIFFIS: Yeah, but aren't they saying they don't have that?

MS. FERSTER: And in addition, the Historic Preservation Review Board, when it met in September of 2004, made very clear that exactly the types of plans that the Applicant has not submitted are required.

They requested the Applicant, in September of '04, to, when he came back to the Review Board, to come back with a Certified Land Survey, showing all the elevations on his property, as well as his neighbors' rear yards, at least 20 or 30 feet into the neighboring property so we can really see what is accurate here. So since September of '04, the Applicant has been on notice that this type of land survey is required.

In addition, the Office of Planning made clear, in July, that they required the Land Survey. So the Applicant has been on notice for some time that this survey is required, so we don't think that there is good cause for the postponement.

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The second reason why we oppose the postponement, is that it would result in prejudice to the neighbors. This is an after-the-fact zoning approval request. After-the-fact meaning that the addition is virtually complete.

It's been, it's been, it's framed, it's roofed, and yet it's not finished at this point. So it's literally an eyesore in the neighborhood. The property is also neglected.

The issue in this case is the visual impact on the adjoining neighbors. Obviously, the visual impact is exacerbated because this addition already exists in its full mass and in scale, without any kind of finishing at all.

So they really are facing a significant eyesore. The case has been in limbo, quite frankly, for 14 months now.

CHAIRPERSON GRIFFIS: So that makes it difficult, how does that prejudice the neighbors in the presentation of their case?

MS. FERSTER: Well, the prejudice is not in the presentation of their case. The prejudice is that they have to, if this case is postponed there will be no resolution of this issue and they will continue to

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live with this eyesore.

CHAIRPERSON GRIFFIS: That fits within the definition of prejudice that they have to live with it and that wouldn't just be an inconvenience or however you want to categorize it.

MS. FERSTER: That's their position, is that they would be prejudiced by continuing this case so that they're left with an eyesore for however long it takes to reschedule this matter.

CHAIRPERSON GRIFFIS: Okay.

MS. FERSTER: And then the final point I wanted to make is that the neighbors don't believe that this Land Survey is absolutely critical to the Applicant's case at this point.

The reason why the Office of Planning requested the Land Survey, is because a Land Survey was needed to determine the grade of the rear yard, which in turn would have determined whether or not the deck is more than four feet above the grade, so it would be included in lot occupancy.

Now, we are prepared to provide graphical representations and we think the Applicant's own submission shows what the grade plane is on the rear.

And it's plainly by the Applicant's, even

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the Applicant's own measurements, more than six feet above the rear grade.

CHAIRPERSON GRIFFIS: Okay.

MS. FERSTER: So we don't think that that is key to determining that issue.

MR. NUNLEY: Chairman Griffis. Yeah, the number one, the, we're talking two bodies here, Historic Preservation and Board of Zoning Adjustment.

We knew, the reason that this case has been in limbo for 14 months is that the Office of Planning, I mean, not, I'm sorry, not the Office of Planning.

The DCRA put the Stop Work Order up at the behest of the citizens because the building was over the lot occupancy. We had a meeting with them, they did not give us a letter to go to the Board at that time.

Mr. Taylor went to the Historic Preservation Review Board, who had also approved the original plans upon which the permit was based, and they asked him, I'm finding in retrospect, for this Topographic Site Plan. There was no request for this body until we met with the Office of Planning.

And the request for the -

CHAIRPERSON GRIFFIS: What was the date on

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that?

MR. NUNLEY: That was the 20th of June.

CHAIRPERSON GRIFFIS: Of this year?

MR. NUNLEY: Yes, of this year.

CHAIRPERSON GRIFFIS: That's an important date.

MR. NUNLEY: Yes. And, so we made arrangements, it took a while, but we made arrangements to get this done, but the Engineer cannot have it done for, could not have it done for us on time for this hearing.

The reason for the Topographic Site Plan was not only to show the height of the deck, which is an architectural issue that can be mitigated, or modified, but to show the impact on the surrounding neighbors because of the slope of the land.

So it's critical to our case. The neighbors are saying that it's going to have such a negative impact, we need to know exactly what that slope is and how that contributes to the potential impact.

CHAIRPERSON GRIFFIS: Understood. Mr. Nunley, you bring up an excellent point. And for clarification, as we move forward with this, whether it be today or later, clearly we're going to be

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looking at this as a special exception that's gone in as an application, this is not an appeal.

This is not going into the history of what happened at HPRB or anything else. Those elements would be non-relevant unless it can be shown to be relevant, directly to the special exception case.

The fact of the matter, Mr. Nunley, that you brought up on this June, '05, was when this was brought forward and I guess that's with the coordination with the Office of Planning that was requesting that document. Is that correct understanding?

MR. NUNLEY: That is correct.

CHAIRPERSON GRIFFIS: Okay, and so at that point it is somewhat within a small time frame for this. However, how do you respond to the fact of, I know I've just said this, but you had another review body that requested this some time ago.

Was it not done at that point? It just didn't seem needed at that point?

MR. NUNLEY: I can only say that we, I know it wasn't done. I wasn't involved in that part of the process.

CHAIRPERSON GRIFFIS: Okay.

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MR. NUNLEY: But, we had a new Zoning Administrator come in. One of the reasons that this took 14 months is because we couldn't get a letter out of the Zoning Administrator's Office, the then Zoning Administrator, to allow us to come before this body.

So we had a new Zoning Administrator who reviewed the case and gave us a letter which allowed us to apply here. And that's what got us to this point. And that's what took so long.

CHAIRPERSON GRIFFIS: And you have submitted documents, the revised section or elevation, I don't recall which one it is.

MR. NUNLEY: Yes, I did. That was, it -

CHAIRPERSON GRIFFIS: The elevations?

MR. NUNLEY: It was brought to our attention, or to my attention, that the original drawings implied that the grade was flat and it is clearly not, at the rear of the house.

CHAIRPERSON GRIFFIS: Okay, and you don't think that that's enough to make your case today?

MR. NUNLEY: No, because it doesn't show, it slopes further. It doesn't show the grade of the adjacent properties, which is extremely important in this case.

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CHAIRPERSON GRIFFIS: Okay. Does the ANC have a comment. If you wouldn't mind, just turn your mic on and you can state your name and address for the record.

MR. WHEELER: Yes, sir, my name is Faith Wheeler, I am the Advisory Neighborhood Commissioner of the Single-Member District in which 6919 6th Street is located.

And my comment is that HPO, Historic Preservation Office is part of the Office of Planning, it's not a separate body, in that regard. And the building is already built, essentially the shell.

You can see the structure and it's clear what the impact is currently on the neighbors, the neighbors' properties.

CHAIRPERSON GRIFFIS: Okay. So the point is?

MR. WHEELER: The point is that a delay, I think, is not necessary. The Topographical Study, perhaps, is not necessary. The objective of a Topographical Study is already achieved.

CHAIRPERSON GRIFFIS: Understood. Board Members? Ms. Miller?

VICE CHAIR MILLER: Mr. Nunley, when will the Topographical Map be ready, Mr. Nunley?

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MR. NUNLEY: I've been told it would be ready by the end of this week.

VICE CHAIR MILLER: And when did you know when it would be ready?

MR. NUNLEY: I talked with the Engineer yesterday.

VICE CHAIR MILLER: Ms. Ferster, I just want your opinion as to the Applicant's additional reason for seeking a postponement, that being his attorney, their attorney not being able to be here today. Do you have a comment on that?

MS. FERSTER: I don't think that that's an adequate reason. Mr. Nunley is a very competent zoning professional and my clients are frequently in that situation too, and they are competent to proceed without me and do in many cases.

VICE CHAIR MILLER: Okay, thank you.

MR. NUNLEY: Well, I'd like to comment on that. Mr., excuse me, Mr. Farmer has been an integral part of this from the beginning. He went to the Historic Preservation Review Board. He or staff went to the Historic Preservation Review Board with Mr. Taylor. He and I have worked in collaboration and I'm really flying blind without him here.

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VICE CHAIR MILLER: I just have one more follow-up question, and Mr. Griffis may already have asked this, but there is this question about you were asked to do a Topographical Map like a year ago or something, and haven't done it until now. And what is that explanation?

MR. NUNLEY: Well, number one, we knew we had to come to this Board before we went back to HPRB. And we felt that we could wait, well I assume that they felt that they could wait to hopefully get approval through this Board and then do the Topo, then go again to HPRB.

HPRB didn't make a decision, they tabled it. So we felt, once we got the letter from, we got cooperation finally from the Zoning Administrator's Office to allow us to come before this body, we felt that we would come here, get the lot occupancy and side yard issue dealt with, and then go to HPRB with a final plan.

We couldn't go to HPRB and say, well, yeah, we want, take a look at this building but we don't have zoning approval.

VICE CHAIR MILLER: And is it your testimony that you didn't know that you would need the

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Topographical Map for your case until Office of Planning told you that in June?

MR. NUNLEY: Well, the Office of Planning requested it and much of the recent opposition materials that I had received talk about the topography and how the building towers over the other properties. So it was critical in both instances.

VICE CHAIR MILLER: Thank you.

MEMBER MANN: Mr. Nunley, did you say that there was one piece of documentation that you are lacking today or two?

MR. NUNLEY: One piece. The other thing that the Office of Planning asked for was a Site Plan, I'm sorry, a Wall Check showing the exact location of the walls, and we do have that.

MEMBER MANN: Okay, so you did bring that, that additional piece of information?

MR. NUNLEY: Yes.

MEMBER MANN: Thank you.

MR. HOOD: Mr. Chairman, through you I guess the Office of Planning, I know Ms. Wheeler can help me with this, but is this, Mr. Nunley, in the Takoma Plan Overlay District? It's close to it if it's not.

MR. NUNLEY: It's within the Historic

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District. I just thought it was just called Historic Takoma, I don't know the specifics.

CHAIRPERSON GRIFFIS: There's a zoning overlay.

MR. HOOD: Ms. Wheeler, can you -

MR. NUNLEY: Oh, I'm sorry, you're talking, no, that's not, it's not within that overlay.

MR. HOOD: It's not, okay.

CHAIRPERSON GRIFFIS: Good question, thanks for the clarification. Ms. Miller.

VICE CHAIR MILLER: Mr. Chairman, I would like to ask Office of Planning their position on whether this Topographical Map is necessary for going forward in this case today?

MS. BROWN-ROBERTS: I think it's necessary for our analysis, because when I went on the site visit what I saw was completely different from what I've seen on the plans that were submitted.

And I can tell you what I've seen, but I think if I have the documentation for it, that would be better.

VICE CHAIR MILLER: Thank you.

CHAIRPERSON GRIFFIS: Okay, enough talking about what we do today. We've got to make a decision.

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Frankly, Mr. Nunley, this is somewhat disruptive not being able to hear this today, because we obviously have it on the schedule and I'd like to move forward with it.

So I want to ask you very directly whether you think that you could at least start, if not finish, but at least start today and move forward with the documentation that you have.

I fully understand that you are saying that you need additional documentation and that Mr. Farmer is not present. So factor that in. But let me put it all to everyone else here.

There is, I would anticipate that if we do not hear this today, or at least start it today, we probably won't hear this until November. Our schedule has already been set and published up through, if I'm not mistaken today, through the middle of January.

I am just reviewing the schedule on the side here, and don't see where we could actually try to fit this in, even if it was just for an hour or two.

So, Mr. Nunley, why don't you take a minute or so and talk to your client on that and we will get back to you.

(Whereupon, the foregoing matter went

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off the record at 10:17 a.m., and went back on the record at 10:21 a.m.)

CHAIRPERSON GRIFFIS: Okay, we have one other alternative, Mr. Nunley, before you respond to my direct question, and that is setting this for the first case in the afternoon next week.

We have one other large case which we would try and fit in. Mr. Nunley, your response?

MR. NUNLEY: That would be acceptable.

MS. FERSTER: That's -

CHAIRPERSON GRIFFIS: Ms. Ferster.

MS. FERSTER: I'm sorry, I will be out of town and my clients will be out of town next week.

CHAIRPERSON GRIFFIS: Okay, and I appreciate that. Mr. Nunley, proceeding today?

MR. NUNLEY: Given that information, then we would reiterate our request for the postponement, even if it moves into January, if necessary. I would be, I would not be doing my client proper service if I were to go forward today without that information and without Mr. Farmer.

Mr. Farmer was, has been an integral part in this case and he has been to many meetings and has had many conversations with folks that I have not had.

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And I can't speak on his behalf in that regard. We would be at a tremendous disadvantage if we were to move forward today.

MS. FERSTER: Can I just make one point to clarify one issue. Mr. Farmer has not entered an appearance in this proceeding, as far as I can tell. We've been looking through the records.

There's no letter authorizing him as a representative, so I don't understand how he's such an integral part of this case when there's no letter indicating that Mr. Farmer will be representing the Applicant.

CHAIRPERSON GRIFFIS: Right, I tend to agree, okay.

MR. NUNLEY: I brought Mr. Farmer in because I needed his assistance in this case. So he's working, actually, for me, if you will.

MS. BROWN-ROBERTS: I just wanted to say that I have never seen, I mean I've had no contact at all with Mr. Farmer on this case.

CHAIRPERSON GRIFFIS: Okay, all right. But there's no reason that this Board, in this particular case, would raise the bar so high that we don't ask any other Applicant too.

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I mean it's not uncommon for an Applicant to come and have a report from a Government agency that is three or four days before the hearing that is not what they had anticipated and they want to further document it.

And this Board is very, what would be the correct word to be quoted on. This Board takes seriously requests for postponements by Applicants the first time.

We don't like doing it, as I think I've been strong enough to say. It really kind of destroys our schedule. And here we are just ticking away time talking about whether we will or will not do something.

Let me set out another date. It's going to be the 2nd of August, 2005. We would have a two-hour window in order to hear the case at some point during the day. Mr. Nunley, you would be prepared to move forward at that time?

MR. NUNLEY: Yes.

CHAIRPERSON GRIFFIS: I fully note that it's going to be summertime and not everyone's schedule is going to be met. The ANC, the 2nd? Could you turn your microphone on please?

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MR. WHEELER: Excuse me, what day of the week, that's Tuesday as well? Yes, I expect I would be here.

CHAIRPERSON GRIFFIS: Ms. Ferster?

MS. FERSTER: I will be out of town, and my key client representative, who is going to be doing the bulk of the opposition presentation, is not available.

CHAIRPERSON GRIFFIS: When are you in town?

MS. FERSTER: What?

CHAIRPERSON GRIFFIS: What's your schedule this summer?

MS. FERSTER: I'm, I will be out of town all next week. I will out of town, I have to travel July 26th, no, 27th, 28th, 29th, and then I'll be out of town all week. I'm in court hearings in Boston the week of August 1st, so I'll be out of town that entire week. And next week I'm on vacation.

CHAIRPERSON GRIFFIS: There it is. Board Members let me hear, I am of the, not strong but of the opinion that we would set a new date for this so that the Applicant is fully prepared.

I don't anticipate that we would entertain any other continuances based on the similar request of

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needing further documentation, and I would like to set this for the last case in the afternoon of 13 September. Board Members, comments on that? Is everyone in accordance and opinion of agreement?

(No response.)

CHAIRPERSON GRIFFIS: No opposition. Let me hear, Mr. Nunley are you available on the 13th of September?

MR. NUNLEY: I will make myself available.

CHAIRPERSON GRIFFIS: Excellent. Ms, is the ANC?

MR. WHEELER: Excuse me, again, is that a Tuesday? Yes.

CHAIRPERSON GRIFFIS: Actually we won't schedule anything outside of Tuesdays here. Some of us have lives.

(Laughter.)

MR. WHEELER: Thank you, yes.

CHAIRPERSON GRIFFIS: Okay. Ms. Ferster?

MS. FERSTER: Again, my clients are all here today. Everybody -

CHAIRPERSON GRIFFIS: Understood.

MS. FERSTER: - has taken time off from work.

CHAIRPERSON GRIFFIS: Understood.

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MS. FERSTER: It will be difficult to reassemble everybody. We're prepared to go forward so we continue to be adamantly opposed to a postponement.

CHAIRPERSON GRIFFIS: Right.

MS. FERSTER: I'm available on the 13th.

CHAIRPERSON GRIFFIS: Okay, okay. Ms. Ferster, and I strongly appreciate and actually in many parts agree with your opinions in terms of assembling.

I mean we have assembled, we've read, we've prepared, we're ready to go also. However, it does come down to be a difficult situation when an Applicant isn't feeling that they are fully prepared or that, in fact, their legal participant would not be present today.

So, with that caution, in order to make sure that the Applicant is fully able to proceed, let's set this for 13 September, third case in the afternoon.

I would note that people, just for your own understanding, you should probably check with the schedule as it's published closer to September. And I would also note that you may want to turn on the website in the morning session on the 13th, to see how the schedule is going.

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The third case in the afternoon this will be called. And so this will not start precisely at 1:00, I can guarantee you, however I'm not sure what time exactly it will start. I think the Board would be prepared to run a little bit beyond our closing hour of 6:00, in order to finish this case.

Now, with that, setting for September 13th, the third case in the afternoon. For all those party in opposition, the ANC and also the Applicant, this is a special exception that's coming before us.

The Board is reviewing this as if this is a proposed construction, as we do in all the cases. We have plans and application for a special exception approval.

I'm looking for the case presentation by the Applicant to be directly related and directly address the special exception test. I would look for the opposition case presentations and the ANC's case presentation to do two things.

One, assess of how that burden has not been proven and to show how in-adverse it would be, it would have an undue impact in terms of the light and area use privacy or character.

The test is very clear and that's what we'll

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be doing. So, to be more direct, perhaps, it will not be jurisdictional or relevant for the case presentations, as we go forward, to talk extensively, if at all, about the past history of what's happened.

The permits that were pulled or not pulled, correctly done or not correctly done. There is a way to appeal permits and it is before this body.

However, this is not an appeal, but a special exception application. Okay, I'll answer any sort of procedural questions or clarifications that are needed at this time? Mr. Nunley, Ms. Ferster?

MS. FERSTER: Now, my client, who is going to be making, as I said, the bulk of the opposition case needs to check his schedule on the 13th, to see if it can be moved around to accommodate that.

Is there some way we can get back to you if that ends up being a problem?

CHAIRPERSON GRIFFIS: I mean, yeah, on the 13th you can bring a motion to postpone again, if you're not prepared to go. Otherwise -

(Someone off microphone.)

CHAIRPERSON GRIFFIS: I know my difficulty is in order to postpone or to reschedule a hearing, I have to do it on the record. I have to do it within

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the case as it's been called, which we're doing today.

I would not have any other, even if you called and we all knew, and everyone, there's, legally I can't reschedule this.

MS. FERSTER: Well, if we could just ask that if, and I hope this won't be the case, but if in fact it turns out that he cannot reschedule this matter, that's on the 13th, that we could have you take it up at some earlier point, only because otherwise we'd come on the 13th, again, everybody -

CHAIRPERSON GRIFFIS: Indeed, and bring everyone down.

MS. FERSTER: - takes off from work.

CHAIRPERSON GRIFFIS: And I don't want to be, you know, difficult encumbrances on peoples' schedules, I think it's perfectly appropriate - good enough, yes.

What we're going to do is note the possibility of doing that. Obviously you are representing a lot of the folks that are here today, so I imagine the communication can be sent out pretty quickly.

Ms. Ferster, we'll note the opportunity to bring this up again, to call it in a special public

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meeting or however we need to do it, if need be. However, let's be very clear for everybody.

We have, what, two more sessions before our August recess, and then August the 2nd would be our final day, which is just a public meeting. So, my whole point is, as soon as you know, let's get it together and we'll pick it up if we need to, hopefully we won't need to.

And do note the alternative we're going into is November. So, also assess that in how you juggle schedules. At this point, though, it has been officially announced and approved third case in the afternoon the 13th of September.

And other questions, procedural questions, I can answer in this case? Ms. Wheeler, ANC is all set?

MR. WHEELER: Yes, sir, thank you.

CHAIRPERSON GRIFFIS: Mr. Nunley, nothing else?

MR. NUNLEY: No, thank you, sir.

CHAIRPERSON GRIFFIS: Very well. Ms. Bailey, is there anything else we need to go over for this case?

MR. MOY: Mr. Chairman, would the Board be interested in having a supplemental OP report, given

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the circumstances?

CHAIRPERSON GRIFFIS: Certainly, keep the record open for that, absolutely. Ms. Miller.

VICE CHAIR MILLER: Mr. Chairman, I just want to note that, you know, I recognize that it's a great inconvenience on many individuals to do this kind of postponement, and I think a big factor, certainly in my decision, is Office of Planning's feeling that they need that Topographical Analysis to do a proper analysis.

I just want to remind the Applicant that that Topographical Analysis must be served on Office of Planning and the ANC and the Intervener, you know, as soon as possible, after it is ready, so they can do their analysis and be prepared.

MR. NUNLEY: Yes, we will, thank you.

CHAIRPERSON GRIFFIS: Good, anything else?

(No response.)

CHAIRPERSON GRIFFIS: Good. Okay, if there's nothing further then, I thank you all very much. We do apologize for not being able to proceed with this, but we will see you on the 13th of September in the afternoon.

MR. NUNLEY: Thank you.

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CHAIRPERSON GRIFFIS: Let's go ahead then and call the next case in the morning. Do you need to move that out of the way? Okay, if you don't mind, we're just going to take up this side of the table why you guys get your equipment out of the way, so we can utilize the time left in the morning.

Ms. Bailey, when you're ready, why don't we call the next case.

MS. BAILEY: Application Number 17343 of Peace Baptist Church, pursuant to 11 DCMR 3103.2, for a variance from the lot occupancy requirements under Section 403, and a variance from the nonconforming structure under Subsection 2001.3, to construct a new entrance lobby to an existing church.

The property is zoned R-4, and it's located a 712 18th Street, N.E., Square 4511, Lot 67.

CHAIRPERSON GRIFFIS: Excellent, thank you very much, Ms. Bailey. Good morning. If you wouldn't mind, yes, there it is. Just state your name and address for the record.

MS. ZIEGLER: Yes, my name is Colleen Ziegler, and I work for Whitehead, Philippee and Harris. We're the architectural firm for Peace Baptist Church. That's located at 314 West Lincoln

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Highway in Penndell, Pennsylvania 19047.

CHAIRPERSON GRIFFIS: Excellent, thank you, Ms. Ziegler. The case record is very full on this. Is there something you would like to add in your presentation this morning?

MS. ZIEGLER: One thing I wanted to add, I don't know if it's in the file, it's from the Advisory Neighborhood Commission of ANC-6-A. There was a meeting to explain the project to the ANC-6-A, as well as the Economic Development and Zoning Committee.

CHAIRPERSON GRIFFIS: Good. And it's Exhibit Number 24 and they -

MS. ZIEGLER: It is in the file, okay.

CHAIRPERSON GRIFFIS: - are recommending approval of this, correct?

MS. ZIEGLER: Yes.

CHAIRPERSON GRIFFIS: Excellent. Okay, is the ANC represented today, 6-A?

(No response.)

CHAIRPERSON GRIFFIS: The representative of the ANC is not present this morning. Very well, anything else you'd like to add.

MS. ZIEGLER: Only if there's any questions.

CHAIRPERSON GRIFFIS: Indeed. Let me ask you

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a very quick question. In the Office of Planning's report they've indicated that there might be additional relief required in this, and a variance from the parking, also the rear yard. Did you have any, an opinion on that?

MS. ZIEGLER: The rear yard is an existing 16 feet, we're not changing that. It's just a continuation of an existing condition.

CHAIRPERSON GRIFFIS: Understood.

MS. ZIEGLER: The parking, we're not changing the seating capacity in the sanctuary at this time. We do have parking down the street, which is a lot that is approved, however it's not on the, per se, the church property itself, proper.

CHAIRPERSON GRIFFIS: Understood, okay. And the addition you're proposing, of course, is to accommodate better access -

MS. ZIEGLER: It's a lobby addition that allows handicapped accessibility to the facility with an elevator at street level. Presently they have an elevator, but it doesn't get handicapped people into the facility.

It just gets people within the facility itself.

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CHAIRPERSON GRIFFIS: Right, which is increasing the lot occupancy, but not the occupancy of the building, is that correct?

MS. ZIEGLER: Correct.

CHAIRPERSON GRIFFIS: Indeed. And this structure obviously, or this structure was built prior to the zoning regulations adoption in the District of Columbia, is that correct?

MS. ZIEGLER: That is correct.

CHAIRPERSON GRIFFIS: Okay, any other questions from the Board?

VICE CHAIR MILLER: Good morning.

MS. ZIEGLER: Good morning.

VICE CHAIR MILLER: I just want to ask, you're not required to make the entrance ADA compliant, right, it's something that you choose to do?

MS. ZIEGLER: It is something we are choosing to do, to better meets the needs of the neighborhood as well as the church.

VICE CHAIR MILLER: Right, thanks.

MR. HOOD: You're not providing on-site parking now, anyway, are you?

MS. ZIEGLER: No, we do not.

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MR. HOOD: Okay. And let me just ask you, does the permit parking also go into Sunday? They don't, they don't, it's just Monday through Friday?

I'm looking at the pictures, actually, and I see they have a -

CHAIRPERSON GRIFFIS: They're on the street.

MR. HOOD: You're on the street.

CHAIRPERSON GRIFFIS: Is it zone parking out in the front, residentially zoned?

MS. ZIEGLER: The property directly in front of the church, is just the church itself. It's not attached to residential homes. I'm not sure -

CHAIRPERSON GRIFFIS: The parking on the street often times, with this you have the parking that's residentially zoned. Say, if you're in Ward 1, it's Zone 1 sticker or otherwise your own -

MS. ZIEGLER: Can I defer to the church member?

CHAIRPERSON GRIFFIS: Yes.

MS. ZIEGLER: Not on the side with the church.

CHAIRPERSON GRIFFIS: There's not zoning on the side of the church?

MS. ZIEGLER: Correct.

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CHAIRPERSON GRIFFIS: Okay.

MR. HOOD: No follow up, thank you.

CHAIRPERSON GRIFFIS: And other questions from the Board.

(No response.)

CHAIRPERSON GRIFFIS: Very well, if there's nothing else for the Applicant, why don't we move ahead to the Office of Planning.

MR. MORDFIN: Good morning, Chairman and members of the Board. I'm Stephen Mordfin with the Office of Planning. And the Applicant proposes to reconstruct the 18th Street entrance of the church, increasing the lot occupancy to accommodate an ADA Compliance.

This new entrance will have no effect on the existing 16 foot rear yard, or the existing lack of parking provided on the site.

The subject property is unique because it was constructed prior to the adoption of zoning regulations, and as a result does not conform to the bulk regulations of the R-4 Zone District in which it is now located.

If the three requested variances are not granted, the Applicant will not be able to provide an

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ADA compliant entrance to the building without the removal of a portion of the existing building, and that would be two impractical difficulties to the Applicant.

Therefore, the Office of Planning recommends approval of variance, as requested by the Applicant. And that concludes the presentation of the Office of Planning.

CHAIRPERSON GRIFFIS: Excellent, thank you very much. Just a quick clarification. You indicated that the requested relief of three variances. But my understanding is that the requested relief is just from lot occupancy in 2001.3, which would the use of nonconforming structures.

MR. MORDFIN: The applications requests it from all three of those. They filed for variance relief from -

MS. ZIEGLER: Just to continue, continuing existing conditions. It's not that we're changing those in any fashion.

CHAIRPERSON GRIFFIS: Oh, I see. Excellent.

MS. ZIEGLER: Trying to make sure all dots, and all t's are crossed.

CHAIRPERSON GRIFFIS: Right, right, right,

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okay. Is there anything else?

(No response.)

CHAIRPERSON GRIFFIS: Office of Planning, any cross? Do you have Office of Planning's analysis? Do you have any questions of them?

MS. ZIEGLER: No, I do not.

CHAIRPERSON GRIFFIS: Excellent. Do Board members have any questions of the Office of Planning?

(No response.)

CHAIRPERSON GRIFFIS: Very well. Excellent report as usual, very thorough. Let's move ahead then to, as noted, we do have ANC-6-A's report. It is recommending approval, and it's Exhibit 24. Not noting any representative from the ANC, we'll move ahead.

I don't have any other attendant government reports to this application, unless you are aware of any others?

MS. ZIEGLER: No.

CHAIRPERSON GRIFFIS: Very well, let's move ahead then. Are there people present today, either in support or in opposition of Application 17343? Persons present to provide testimony? Anybody here that would like to speak to this application?

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(No response.)

CHAIRPERSON GRIFFIS: Not noting anybody come forward, I think we can move ahead to any closing remarks that you might have?

MS. ZIEGLER: Just that I have approval. No postponement.

(Laughter.)

CHAIRPERSON GRIFFIS: All right. Closing remarks, wishes or whatever it is? Okay. There it is. Board members, further questions on the application.

I think this is appropriate to move forward and I would move approval of Application 17343 for, as stated by the Office of Planning correctly, the variances from, well, I'll clarify that.

Anyway, from the variances requested, the lot occupancy and also nonconforming structures, and I would ask for a second?

VICE CHAIR MILLER: Second.

CHAIRPERSON GRIFFIS: Thank you. Just to note, in terms of, the request for relief is one thing, and it was appropriate for Office of Planning to analyze that, based on the requested relief, and I think their analysis is exactly on, that these areas

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aren't impacted.

It is my opinion, and I think it would be the Board's opinion, that relief would not be required for those aspects that were, in fact, not impacted or changed in anyway.

However, as you put this together, and just to keep this rolling here on the right track, I think we can move ahead with the requested - it is fairly clear that this is a unique property that is established, first of all, by one, it's use, actually, in the R-4, in terms of its history and the construction prior to the regulations.

Which then made it nonconforming just based on the adoption of the zoning regulations. The fact of accommodating this, obviously, as it is beyond the lot occupancy in terms of the modernization to be accessed much easier by those that might fall under ADA.

I think it's absolutely appropriate and obviously shown to be a practical difficulty, this wouldn't impair the intent and integrity of the Zone Planning Map, in any way that has been evidenced in this record, and therefore I obviously will be supporting the motion. Are there others?

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(No response.)

CHAIRPERSON GRIFFIS: If anyone else speaks to that motion, I would also add that I think the great reliance on the Office of Planning's Report is very appropriate in this case. There it is. Anything else.

(No response.)

CHAIRPERSON GRIFFIS: The motion has been seconded and I ask for all those in favor signify by saying aye?

(Chorus of ayes.)

CHAIRPERSON GRIFFIS: All opposed?

(No response.)

CHAIRPERSON GRIFFIS: Abstaining?

(No response.)

CHAIRPERSON GRIFFIS: Very well, why don't we record the vote.

MS. BAILEY: Mr. Chairman, the vote is recorded as 4-0-1, to approve the application. Mr. Griffis made the motion, Ms. Miller seconded, Mr. Mann and Mr. Hood are in agreement, and Board Member Etherly is not present today. And do you want a Summary Order, Mr. Chairman?

CHAIRPERSON GRIFFIS: Excellent. Why don't

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we call the next case of the morning. Thank you very much and good luck with that.

MS. BAILEY: Application Number 17347 of 13th Street Lofts, LLC, pursuant to 11 DCMR, 3103.2, for variances from the lot occupancy requirements under Section 403, a nonconforming structure provisions under Subsection 2001.3, and pursuant to 11 DCMR 3104.1, special exception from the roof structure provisions under Section 411, to allow the construction of a nine-story residential building at 1209 through 11 13th Street, N.W.

The property is zoned R-5-E and it's located in Square 281, on Lots 8 and 26.

CHAIRPERSON GRIFFIS: Thank you, Ms. Bailey.

Let me just note for the Board I will not be hearing this case. I'm recusing myself from any deliberation or processing this as it is known in front of all the Board members this is, the Architect of record on this case is my previous employer.

And so, I will let you have some fun and see you guys all for lunch, shortly. Ms. Miller.

VICE CHAIR MILLER: Thank you. Good morning.

MS. BROWN: Good morning, Madame Chair and members of the Board. My name is Carolyn Brown, from

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the law firm of Holland and Knight. I'm here today with representatives of the owner, Mr. Marc Weller to my right and Kevin Ash, who's in the audience.

To Mr. Weller's right is Mr. Ron Schneck of the law firm, architectural firm of Hickock, Warner, Cole, and Steven Sher from Holland and Knight is also here.

We are pleased to appear before you today with a unique residential development that includes the renovation and rehabilitation of the Proctor Alley Livery Stable, a very unusual and unique landmark in our city.

In order to achieve redevelopment of the property, however, it is necessary to seek variances from the lot occupancy requirements and the provisions for an addition to an existing, nonconforming structure, which is the Proctor Alley Livery Stable.

It is nonconforming with respect to lot occupancy. It occupies 100 percent of the lot and it's also a nonconforming use. As you'll hear in the testimony from our witnesses today, the existence of this landmark, the L-shaped configuration of the property and the narrow street frontage, are all exceptional conditions that create practical

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difficulties in meeting the strict application of the zoning regulations.

We are also seeking a special exception from the roof structure setback requirements on the north side of the building, which is necessary for the successful operation of the building.

We are pleased to have overwhelming support from the community on this project, including the ANC, which we believe has submitted a letter in support to the record.

We have also received conceptual design approval from the Historic Preservation Review Board.

We've read the Office of Planning report and agree with its conclusion that the application should be granted, and, in fact, we're not aware of any opposition to this project.

With that, if there are no other preliminary matters or questions from the Board, I would like to present our first witness, Mr. Marc Weller, thank you.

VICE CHAIR MILLER: I just have a preliminary question. How unique is a Livery Stable as a building in the city?

MS. BROWN: It's one of the few that's still in existence. There are several on Capital Hill, most

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have been demolished. You'll find some in Dupont Circle, but it's one that can actually be traced as a Livery Stable and it actually has the small windows at the upper level for horses.

So it does have some unique features that actually presented some very interesting challenges to convert it to residential use.

VICE CHAIR MILLER: Great, thank you.

MR. WELLER: Marc Weller with LLC Properties. We're located in Rockville. I've lived in the District for many years, started working in the District about eight years ago.

This project started with just the Livery Stable. I'll give you a little history on the project. It started with just the Livery Stable.

Slowly but surely we realized that there was no chance of converting the existing Livery Stable to a residential use by itself, due to the fact that it sat on an alley that would not be wide enough in order to get fire trucks and so on.

It was originally, I guess, a tenement law, a tenement housing issue, and they wouldn't let us get back there. So what we decided to do was take the Office of Planning's advice and start trying to create

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some sort of connectivity to the street.

And that's what leads us to where we're at right now. The original project looked so exciting for our company was that it gave us the ability to reanimate an old building, what they call an adaptive reuse in the city for a conforming use.

And, you know, obviously you don't see a lot of older buildings in the District of Columbia like you would see in Manhattan or other areas. So it was very exciting from that standpoint, because you would be able to take this Livery Stable, convert it to residential use, and create a true loft or a true industrial-type feel that's hard to come by in the District.

VICE CHAIR MILLER: Can I interrupt for a second?

MR. WELLER: Yes, ma'am.

VICE CHAIR MILLER: Why is it that we don't see it here but you see it in New York?

MR. WELLER: I'm not sure. I would say that there are more old building stock to choose from. That's my first inclination. You just, this is just my analysis from what I see out in the marketplace and what I see looking at every day.

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I look at a lot of buildings, probably, you know, five, three or four buildings a week, sometimes five. And we just don't see the opportunity lend itself for that.

If you find these industrial-type buildings, in many cases, you'll find that they are, they're in industrial zoning and there's no opportunity to use them for residential use.

So, with the, you know, with the razoring of that entire square and lot, that lent a unique opportunity, and so we're trying to take advantage of that and we're very excited about the project.

VICE CHAIR MILLER: Thank you.

MS. BROWN: I'd like to move on to our next witness, Mr. Ron Schneck.

MR. SCHNECK: My name is Ron Schneck, I'm with Hickock, Warner and Cole Architects in Washington, D.C. I have a full presentation of sort of boards, if you'd like me to present, or I can give you a sort of quick summary?

VICE CHAIR MILLER: I think we'd like to see it.

MR. SCHNECK: I think that we should at least walk through it.

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VICE CHAIR MILLER: Yes.

MR. SCHNECK: Okay, this is the site. The site is located at 13th and M Streets, sort of mid-block. This red building right here is the existing Livery Stable.

This is the building right here. As you can see, these are the horse windows. This is the existing Livery Stable. Carolyn Brown spoke of the horse windows that are right along here.

And this is a rendering of our addition, which is, this dashed line right here represents the addition coming out to 13th Street. Basically, sort of, real quick, the design intent was to try to restore the existing Livery Stable sort of back to, you know, it's original condition while adapting the reuse for condominium units and then the sort of intent for the new structure would sort of connect to 13th Street, and that's what we see here.

This will be the, this is the proposed 13th Street elevation as current building under construction right now. So basically the special exception for the penthouse, and I'll quickly walk you through that.

Basically, the location of the penthouse has

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to do with the location of the core. The site itself is 28 feet, six inches wide, it's very narrow. And so, in our mind, it is impractical to put a core in the center of a building.

The penthouse or the core would not be wide enough, as well as you would have slivers of space on either side.

So what we did was we located the core, sort of off to the north. The length of the core is also sort of predetermined by the structural core of the building.

VICE CHAIR MILLER: Excuse me, I'm just going to say, when you're doing this, if you can, it would be efficient, when you describe like why things are placed where they are, especially like, say, with the roof structure, if you can, if you want to tie it to the analysis that's going to have to be made, you know, for the special exception, for instance.

But also when you're saying, you couldn't put it in the center because it would be too wide, maybe, for our benefit, if you could say a little bit more. To you it may be self-evident, why that means that's too wide, but for me it's like too wide, why?

MR. SCHNECK: Basically to adhere to the

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zoning strictly, we would have had to put the penthouse, because of the 28 foot, six, of the width of the site, the penthouse would have had to be basically, or, and the core as well, would have to be eight foot, six, which is basically too narrow to accommodate the stair and the elevator that we need.

So that's basically, our decision is, you know, to push it off to the side which allows us sort of the width that we need for the core and the penthouse and then also allows us to get usable space further down into the building.

VICE CHAIR MILLER: Do you know what the width is that you need?

MR. SCHNECK: For the core, about ten feet.

VICE CHAIR MILLER: Ten feet, okay.

MR. SCHNECK: Yes. And the other issue with the core is the length of the core. And like I said, the core sort of directly correlates up to the penthouse.

Because of the shape of this building, structurally, basically this core needs to be a certain dimension for the core lateral bracing. As so that's sort of the other thing that sets the core. And so what we did was set, you know, acknowledging

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that we didn't want to impact the light and air of the sort of neighboring properties, we wanted to set it as far back to one side and in the center as possible.

And we feel that we've achieved that keeping more than ample setback on this facade, this facade and this facade. And now, in regards to lot occupancy, essentially, as Carolyn Brown has described, there are two lots, Lot 26 and Lot 8.

Lot 26 occupies 100 percent of the lot. And Lot 8, to keep to the occupancy that we would need would essentially put the building, you know, up to 13th Street somewhere here, and we would have no way to connect the buildings.

And so basically what we've done, and this is all through in sort of talking to HPRB, in terms of how to connect, sort of historically, to this building here.

And so what we've done is connected as sort of lightly as we could, while still maintaining connectivity in terms of shared, sort of stair and elevator from this building to that building as well as utility connections. Do you have any questions?

VICE CHAIR MILLER: I just wanted to clarify, it's probably in our papers, but have the two lots

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been combined into one lot?

MS. BROWN: The lots have not yet been combined, but they will be combined in order to complete the project. So they will be subdivided. This project is considered one whole of the two lots.

VICE CHAIR MILLER: So when we're looking at the lot occupancy, are we looking at the lot occupancy of the combined lot here?

MS. BROWN: The combined lot, yes.

VICE CHAIR MILLER: Okay, thank you.

MR. SCHNECK: Do you have any other questions?

MR. HOOD: Excuse me, I have a couple.

MR. SCHNECK: Yes, sir.

MR. HOOD: And this goes back to, you mentioned about the penthouse. I guess the view, and I'm interested in what type of view am I, is it going to be more prevalent on one side as opposed to the other side? Because you said you shifted the penthouse and I didn't exactly follow all that, but is it going to be suitable, will I be able to see it more from one side or another side?

MR. SCHNECK: Basically, the only that you're going to be able to see the penthouse, is essentially

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this is a sort of little site plan. 13th Street, and this is an alley going off towards the back.

And so from 13th Street you won't see it. From anywhere here you won't see it. From back in here somewhere, deep in the alley, you will see it and I'm showing that accurately here. But that's where you would see the penthouse.

MR. HOOD: So that's what I will, if I'm in the alley, that's what I would see?

MR. SCHNECK: That's correct.

MR. HOOD: I won't see that from the street?

MR. SCHNECK: No, you will not.

MR. HOOD: And I notice on your Drawings A-313, that, um, are these balcony ledges on like every other floor, like the 8th Floor, the 6th Floor and the 4th Floor. So some floors will have it and some floors won't?

MR. SCHNECK: That's correct.

MR. HOOD: Okay. And let me ask you another, the other question is the ceiling height on the different floors. I notice it varies. Why was that? Were you trying to stay within the cap of the height of the whole building, including the penthouse?

MR. SCHNECK: Actually, it has to do with the

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structural system that we're using. For the floors we're using two structural systems. One is sort of composite, steel deck that has a certain thickness, and the other one is a joist system that has a certain thickness.

And because these are loft units, meaning they're two-stories, the joist system is the system in between the two stories of the unit, which allows us to run duct work through there.

So that actually sets the differing heights. The height here, we are 290 feet, which is where we're allowed to be for zoning.

MR. HOOD: Okay, thank you. All right, thank you. Thank you, Madame Chair.

MS. BROWN: I believe that concludes our presentation by the Architects. Our next witness is Mr. Steven Sher, an expert in land use and zoning issues in the District.

VICE CHAIR MILLER: Good morning.

MR. SHER: Good morning, Madame Vice Chair and members of the Board. For the record, my name is Steven E. Sher, the Director of Zoning and Land Use Services with the law firm of Holland and Knight.

I believe that you have, in the Applicant's

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pre-hearing statement, my outline discussing this particular matter.

I'd just like to review that quickly with the Board.

VICE CHAIR MILLER: Mr. Sher, may I interrupt you for one minute?

MR. SHER: Yes, ma'am.

VICE CHAIR MILLER: Ms. Brown, are you proffering Mr. Sher as an expert witness?

MS. BROWN: Yes, if you would please accept him as an expert.

VICE CHAIR MILLER: Mr. Sher has appeared before us many times, but do you, okay, so I don't think we have a problem accepting him, okay.

MR. SHER: What the Board has before it are two areas of relief which the Architect has referenced. We're requesting a variance on the lot occupancy which is also related to the addition to the nonconforming structure and the roof structure relief.

As the Architects have described, and we'll deal with the roof structure first. The roof structure is ten feet in height above the roof on which it is located.

It is allowed to be 18 feet, six, but in

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this case, it's only ten feet. If we had to meet all of the setback requirements, ten feet from the north, south, east and west, we would have only eight and a half feet in the middle of the building upon which we could put any roof structure.

So as a design matter, both to reflect the review from the outside, but also to reflect the view of what happens as you ripple down through the floor plates of each of the floors, the penthouse, including the core, the edge of stairs and the shafts and mechanical services that need to be, have been set to one side of that floor plate, i.e. to the north side, and so we meet the setback requirements on the east and west on street in the alley and on the south side we are adjacent to the lot line on the north side.

For much of that lot line, there is an existing, 90-foot building under construction, almost all done at this point, where we would abut that wall and therefore there would be no way to see the penthouse, but the penthouse, as the Architects have described, does extend further to the rear, so that there is a piece of it that goes beyond the east wall of the building to the north, which you can see from that back corner in the alley as the Architects

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described. Now you'd probably see that penthouse in any event, even if it were setback from the wall, but you see it a little bit more, because we're right on that lot line instead of ten feet back.

We can't be ten feet back, it just doesn't work for the building. You don't, you, and operating difficulties is one of the standards that the Board has to apply.

And if we had to set that core right in the middle, there's no way you could come up with an efficient building that would reflect apartments, which is what we're trying to do, in an R-5-E Zone.

The second area of relief that we're asking for is a variance on the lot occupancy. As we've noted, the existing stable building, which is an individually designated landmark, occupies 100 percent of each lot.

When you combine that with the other lot, it eats up lot occupancy that would otherwise be available because we've occupied more than the 75 percent permitted for the existing lot at the rear, and we wind up with a situation where we could not put a building that would reasonably be constructed on this lot.

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Again, as we've indicated, what we need to do is to connect the new construction to the existing landmark in order to be able to convert the whole building and make it a single building devoted to residential use.

So when we do that, we need to be able to line up the new construction with the existing building and, as you can see from the floor plans, the rear of our building lines up with approximately the center of the existing alley structure, so that you've got a hallway that comes in, goes into the stable, and then you've got units on both the front and the rear of that building.

We wind up then with an apartment building of 28 units in the addition, and eight units in the existing building, 36 units total. All of that meets the requirements of the regulations. But, because the existing stable is over the lot occupancy, the entire project winds up being over the lot occupancy.

VICE CHAIR MILLER: Can you just clarify? There were different figures, and they're pretty small variations, but what the lot occupancy would be? Because it looks like, I see 95 percent, I saw 93.7 percent, I saw 94 percent.

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MR. SHER: My calculation was that 8,149 square feet of the total lot would be occupied, and that works out to be 93.7 percent. The last aspect of this is the addition to the nonconforming structure.

The existing stable is nonconforming because it has no rear yard and it occupies 100 percent of its lot. No matter what we do, we cannot create a rear yard on this property.

So there is no rear yard adjacent to the addition. What's behind the addition is a court. The court in itself complies, but we're building on to a nonconforming structure. And so we need the variance in order to create the addition, which is on the front part of the lot.

The addition itself is within the height and FAR and so forth, but because the existing building is nonconforming, and we're adding on to it in that respect, and because we can't create a conforming rear yard, that's why we need the variance from Section 2001.

So I believe that the, it's, the conditions that we've described constitute a set of exceptional or extraordinary situations and conditions that apply to the property that the strict application of the

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regulations will cause a practical difficulty for the owner, and that the variance should therefore be granted.

That special exception we've demonstrated that we need to stand, as of Section 411, and that the Board should therefore grant the relief that is before it this morning. Thank you.

VICE CHAIR MILLER: I have a question. I think Mr. Sher can answer it, otherwise, Ms. Brown, you can answer it, I'm sure. It's a statement in your pre-hearing statement, Page 7.

It says the underutilization of the limited space available on this parcel would render any development project infeasible, particularly in light of the significant additional difficulties resulting from historic preservation constraints.

And, I'm just wondering if you can just elaborate on that why, if you were to build within the lot occupancy on the additional parcel, why it would be infeasible to have a viable project? Which is what it sounds like the statement is saying.

MR. SHER: The lot is, the lot that connects to the street is only 28 and a half feet wide. When you look to develop that lot, you've got a fairly high

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amount of core factor relative to what you've got left over that can be used for rentable space and usable space for apartment units in the building.

So you need to come up with a, and as Mr. Weller could tell you, this is an expensive building to build because of those factors because of the fact that it's a narrow building and this is something that I only was learning about in the context of this case.

The concept of shear and what the wind forces do to a building that's relatively narrow and how you have to deal with the construction situation which is why the core has to be a certain length, that it's basically holding up the building, keep it from bending in the wind.

I never knew buildings like this could bend in the wind, but apparently they do or then can. So we've got a situation where a number of those factors come together.

I suggest you need to have a certain amount of mass and a certain amount of building to hold it up. The other key factor is the need to be able to connect this to the stable building to make a single building.

Now the stable building is at, towards the

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rear of the narrow lot. You want to build the building starting at the front of the narrow lot and going back. It's only 28 and a half feet wide, so you can't sort of narrow that building any to get further to the back. So when you start at the front to get to the back, that sort of defines the footprint of the building and that's why we think this is the only reasonable and feasible way to develop the site.

VICE CHAIR MILLER: So the massing really is needed for two purposes? One is this, just wind shear-type of physical purpose and then the other purpose, I mean correct me if I'm wrong, and the other purpose is that for the economics to work at all, because it's so narrow and the core takes up so much of its space, you need a certain amount of space for those residences. Is that correct?

MR. SHER: I would say yes, but I would defer to the Architects for further discussion of the shear if you need to have that. Because that's their stuff, not mine.

VICE CHAIR MILLER: So that sounds like a practical difficulty we didn't see in the papers so, do you want to comment on that?

MR. WELLER: I'd like for the Architects to

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comment, if they wouldn't mind. Because that's what it's really come down to, I mean that's the bulk of the issue has come down to, is structurally.

This building is very difficult to build. It's very narrow, it's very high, and it's sort of self-explanatory, but I'll let the representative from Hickock, Warner, Cole.

MR. SCHNECK: Basically, because of the shape of the building, meaning that it is so narrow and it is, you know, to height, 90 feet, it, the big concern with it is lateral bracing.

And so essentially there needs to be a structural core at a certain dimension to keep this building from, you know, moving in the wind. That's basically it.

VICE CHAIR MILLER: Okay, thank you.

MR. SCHNECK: Your welcome. Is anybody, are you finished with your witnesses?

MS. BROWN: Yes, that concludes our direct presentation. We reserve the right to make any closing statement.

VICE CHAIR MILLER: Okay.

MS. BROWN: Thank you.

VICE CHAIR MILLER: Is there anybody here

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from the ANC?

(No response.)

VICE CHAIR MILLER: Okay. And there are no parties in this case that have sought to intervene, so then we can go to Office of Planning.

MR. MORDFIN: Thank you, Madame Chair and members of the Board. My name is Stephin Mordfin and I'm with the D.C. Office of Planning. I'll make this very brief. As described by the Applicant, the subject property is located within Square 281 in the Logan Circle/Shaw area and consists of two lots.

Lot 8 fronts 13th Street, N.W., and is developed with a small commercial building that will be removed. Alley Lot 26 is developed with the Proctor Alley Livery Stable, a three-story landmark building constructed in 1894, currently used as an automotive repair shop and vocational training school.

The Applicant intends to restore the existing stables building for residential use and construct a new, 9-story addition with frontage on 13th Street. The proposal received HPRB approval.

The site is zoned R-5-E, as is the remainder of the square. R-5-E is a high density residential zone for which high-rise apartment buildings are the

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predominant use.

The Applicant has requested special exception relief from rooftop enclosure setback requirements and variance relief to lot occupancy requirements and to allow a nonconforming addition to an existing, nonconforming building.

OP analysis indicates that the proposal meets the relevant tests as prescribed in the zoning regulations. OP concurs with the Applicant's reasoning regarding the difficulty and inefficiency associated with the conforming rooftop penthouse and supports the proposal location.

OP also concurs with the Applicant's discussion regarding lot occupancy variance, given the consolidation of the two lots, noting that an addition conforming to the lot occupancy requirement result in an unnecessarily restricted and out of character footprint.

The proposal is generally consistent with the Comprehensive Plan, and would not undermine the integrity of the zoning regulations. The ANC has indicated support and no other District agency has indicated opposition to their proposal.

As such, the Office of Planning recommends

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that this application be approved. And that concludes my testimony and I'm available for questions, of course, thank you.

VICE CHAIR MILLER: Thank you. I have a few questions. You state in your report that the full ANC meeting is anticipated prior to the hearing date. Did we get a report, a final report from the ANC?

MR. MORDFIN: I did not received a final report. I also didn't see one in the BZA file. Perhaps the Applicant would be able to answer that question.

MS. BROWN: Madame Chair, we did attend the full ANC meeting last Wednesday evening. We did get support. They had, I believe, filed a letter in the record, maybe two weeks ago, saying that they were going to be filing the letter late.

We had been anticipating that and we've been asking for them to get it into the record and we had hoped that it had gotten there. We have not received that copy, but they are in full, unanimous support.

VICE CHAIR MILLER: Okay, yes, we don't have it in the record, either, okay. And I just have a couple other questions, Mr. Mordfin.

Just to follow up, on Page 4 of your report,

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you make a statement that the penthouse setback requirement is intended to minimize visual and shadow impacts of the penthouse and surrounding lands. Just where is that from, you know, the purpose of that setback? Is that in the regulations or is that -

MR. MORDFIN: Well, the intent of the regulations would seem to be that, that there be a setback for the penthouse which would particularly minimize its visual impact on the streetscape. It's not specifically stating the regulations, as far as I know, what the intent of the regulation is, but that's certainly what we believe it to be.

We think in this case the Applicant has located the penthouse in a location which certainly minimizes impact as seen from the street, which we consider a very important consideration.

VICE CHAIR MILLER: I think you made a recommendation in your report that, or you made an observation that it will, to small extent, increase the shadow casts on the rear yard of adjacent, new residential building to the north.

And that you would support some efforts to provide some setback from the north facade below, and minimizing the size of the penthouse, if possible. Do

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you want to elaborate on that, what you mean by that?

MR. MORDFIN: I'll just elaborate on that a little bit. That was more an aside than a recommendation.

VICE CHAIR MILLER: Okay.

MR. MORDFIN: We would support the Applicant looking at that issue. We think it's fine the way that it is. The impact should be minimal. And, as I said, what minimal impact there would be would be on the least public aspect of the building.

The area in question, to the rear of the adjacent building, is already going to be considered to be shadowed by the existing building and by their own building, frankly, the building on the adjacent lot.

So the impact would be very minimal. If there were ways to take a look at further minimizing the impact, we would certainly have no problem with that. At the same time, we wouldn't suggest that it be, that the penthouse be relocated or moved at the expense of the view from the street, or the expense of the functionality of the internal space.

VICE CHAIR MILLER: Okay. My last question is, on Page 4, with respect to lot occupancy, you made

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a comment that entire lot occupancy for the alley lot with stable is close to 100 percent, okay, that's set.

And then you said current lot occupancy on the lot fronting 13th Street, the small, commercial building, is unknown but appears to be conforming. How is it that it's unknown?

MR. MORDFIN: I simply didn't get information from the Applicant and wasn't able to determine for myself accurately, just how big that building is, what the footprint of the building is.

But it looks reasonable small and I would expect that it should quite easily conform, but it's a very different building.

It's a one-story, commercial building fronting directly on to the street, which is what OP wants to see. OP wants to make sure that the new construction, the new addition, provides frontage directly on the street in conformance with the streetscape character.

But we weren't able to determine what that old building -

VICE CHAIR MILLER: And it's not really integral to our analysis.

MR. MORDFIN: It's really not, no.

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VICE CHAIR MILLER: Okay, right, okay.

MEMBER MANN: On Page 2 of your report you have a statement that says the project appears to include upper-story projections out of a public space for which approvals would be required. What sort of approvals are required?

MR. MORDFIN: I'm not entirely clear on what that process is. There is a public space approval process. There is a, I believe, a Board which meets to approve such encroachments if they're necessary.

I'm not entirely sure if they're necessary.

I think that they'll have to deal with the appropriate, with the appropriate people to determine whether or not the kinds of encroachments they are proposing.

Upper-story balconies require that approval and just what process that would be. And, again, it doesn't really affect the variances that are being requested. It doesn't affect the application as such.

We would, my own feeling is that I would actually support those, if public space relaxations are required, I would support those because they add detailing and add variety to the building, which I think is attractively designed, then I wouldn't want

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to see that detailing lost.

I was simply pointing out to the Board that that may be a step that's required.

MEMBER MANN: Okay, thank you, that was, really getting to the heart of my question was the same thing that we needed to take into consideration in our analysis of this relief.

MR. MORDFIN: I don't believe so.

VICE CHAIR MILLER: Mr. Mordfin, I was wondering about your remark concerning how the Applicant might try to decrease the shadow on the residential building next door, on the land?

MS. BROWN: Yes, I can let the Architect respond to that, but I think it's pretty clear in our direct testimony that it is as small as it can be and it is set back as far as it can be, but again, let me refer that to the Architect.

MR. SCHNECK: And this does go back to the structural core issue and essentially if, I mean imagine the building sort of needs to be symmetrical in terms of its lateral support.

And so unfortunately, you know, whatever we set towards the 13th Street-side, we also need to set towards the alley-side and that basically sets the

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core.

VICE CHAIR MILLER: Thank you.

MR. SCHNECK: You're welcome.

VICE CHAIR MILLER: Okay, at this point then, are there any persons here wishing to testify in support or in opposition? Yes.

MR. NURU: Good afternoon, my name is Bekri Nuru, I'm not a lawyer, I'm a tenant from -

VICE CHAIR MILLER: Could you give your name and address for the record? I know you just gave your name, but your address?

MR. NURU: Bekri Nuru, 4806 32nd Street, N.W., Washington, D.C.

VICE CHAIR MILLER: Okay. And are you here to testify in support or in opposition?

MR. NURU: No, I am a tenant on that commercial space you're talking about. I have a grocery store there, I've been there for the last ten years, and the new Landlord has bought it and I'm excited for them to build.

I have no, too much objection for them to do whatever it is they wanted to do, which is good. But I also wonder how the residents will be serviced, simply because that's the only market they got in

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there and there's a lot of, a lot of people wanted to come today.

I was not exactly sure how complicated this will get, so I did not hire a lawyer. But I was hoping in the next, there was a next hearing or something I'll bring the lawyer.

My question is, or my concern right now is the Landlord, the new Landlords, yes, they are doing a good job, it's great. This new thing is exciting, but what about the commercial lease that we have that, how are we going to deal with it.

We've been there for ten years. We have ten years lease and they just can't, not too long they're going to ask us, we are violating the codes and we have to get out. There's just a lot of things going.

Giving us 45 days to get out of that area, there's a lot of concern and we are just closely watching.

And I don't know how it will work and I'm just concerned. I'm just going to be talking to my lawyers, we've been talking to them. They just want me to go and check it out today and get back with them.

I just wanted to let you know that we're not just a commercial that's going to be demolished and

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moved with no consideration of any sort, thank you.

VICE CHAIR MILLER: Thank you. I just want to say that, I mean, I certainly hear your concerns, but this Board doesn't have any jurisdiction over the use of the building that way, you know, who the tenants are. Okay, is there anybody else here who wishes to testify with respect to this case?

(No response.)

VICE CHAIR MILLER: Do my Board members have any other questions?

(No response.)

VICE CHAIR MILLER: Okay, then we'll turn to Ms. Brown for closing.

MS. BROWN: Thank you, Madame Chair. Based on the evidence of record and the testimony presented here today, we believe the Applicant has met its burden of proof in meeting the test for variance relief and the special exception.

We would ask that you grant the application from the bench today and, if appropriate, we would ask for a summary order as well, thank you.

VICE CHAIR MILLER: Thank you. Could you turn your microphone off? It just picks up, thank you. Okay, the Board is ready to deliberate on it.

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At this point, I would move approval of Application Number 17347 of 13th Street Lofts, LLC, pursuant to 11 DCMR, Section 3103.2, for variances from the lot occupancy requirements under Section 403, and the nonconforming structure provisions under Subsection 2001.3, and pursuant to 11 DCMR, Section 3104.1, a special exception from the roof structure provisions under Section 411, to allow the construction of a nine-story residential building at premises 1209-11 13th Street, N.W. Do I have a second?

MR. HOOD: Second.

VICE CHAIR MILLER: I think that the Applicant has made a very strong case here for both variance relief and special exception relief. The variance relief is from the lot occupancy requirement.

The allowable limit is 75 percent and they're seeking 93.7 percent of the current lot occupancy of the Livery Stable is 100 percent, and so they could never, and they need a certain amount of lot occupancy in order to have a viable residence next door and a mass of building that will withstand the wind, etcetera.

And they could not do that without having the lot occupancy that they've presented. But I guess I'll address the variance test first, and then we can

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do the special exception.

I mean with uniqueness, it is a Livery Stable which has gotten historic landmark status. It has that narrow L-shaped layout and has limited street frontage. They've made the case that certainly, as I just elaborated a little bit before, this practical difficulty in building within the lot occupancy, in fact it's not feasible to build within the lot occupancy for the structural reasons as well as economic reasons.

And there's certainly been no evidence of substantial detriment to the public, and, in fact, there are lots of benefits here to the public. And, in fact, as the Office of Planning has said, if they were to do a conforming lot occupancy it would be out of character with the streetscape pattern. They're adding housing and, which advances the goals of Ward 2 and the Comprehensive Plan.

And they are eliminating a nonconforming use and basically improving quality of life and safety by having residences on the street. So that's where I see the variance test, if anybody wants to add to that?

(No response.)

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VICE CHAIR MILLER: Okay, then we have the special exception pursuant to 411.11, for not meeting the setback requirements for the roof structure per 400.7-B. And that, they're required to be set back, under the regulations, equally from all exterior walls.

And they cannot do that in this case. They said it's such a narrow building that they wouldn't have enough space left for an adequate core.

So they met the first test that a strict application would be impractical because of the narrowness of the lot. And we did look into whether or not it would adversely affect neighboring property, and Office of Planning said it's quite minimal, with respect to the shadows.

And we heard testimony that there is really no give at all for them to adjust it so that the shadows would be less. So, I think that they have fully met the requirements of both the special exception and the variance. Okay, any other questions?

MR. HOOD: I was going to second the motion.

VICE CHAIR MILLER: Oh, we didn't have a second?

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MEMBER MANN: I believe I seconded the motion, but -

MR. HOOD: Oh, I thought maybe you were going to speak to it. Okay, I was just going to say that I think the Office of Planning's Report was very well done and it really helped the Applicant to, at least from my perspective, to make the case.

And the difficulty with the penthouse at the top, I thought they were very creative and accommodating, and especially the views from the street and making that actually work with the difficult situation and the circumstances you had to deal with. I just wanted to add that.

MEMBER MANN: I have no further comment, I thought your analysis was quite thorough and touched on all the tests that were necessary.

VICE CHAIR MILLER: Okay. Then all those in favor, say aye.

(A chorus of ayes.)

VICE CHAIR MILLER: All those opposed?

(No response.)

VICE CHAIR MILLER: All those abstaining?

(No response.)

VICE CHAIR MILLER: And Ms. Bailey, do you

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want to call the vote?

MS. BAILEY: For clarification, Mr. Mann or Mr. Hood, who seconded the motion? Mr. Mann?

MR. HOOD: Mr. Mann seconded.

MS. BAILEY: Thank you, sir. The vote is recorded as 3-0-2 to approve the application. Ms. Miller made the motion, Mr. Mann seconded, Mr. Hood is in agreement. Board Member Griffis has recused himself and Mr. Etherly is not present today. And are we doing a Summary Order, Madame Chair?

VICE CHAIR MILLER: I don't see any reason why we can't waive our rules to do a Summary Order. There are no parties in opposition and Applicant has requested it. Do my Board members have any concerns with it?

MEMBER MANN: No concerns.

VICE CHAIR MILLER: Okay, then a Summary Order. Thank you. Ms. Bailey, do we have any other business for the morning?

MS. BAILEY: No other business for the morning.

VICE CHAIR MILLER: Okay, thank you, then this meeting is adjourned.

(Whereupon, the foregoing matter went

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off the record at 11:28 a.m., and went
back on the record at 1:34 p.m.)

AFTERNOON SESSION

1:34 p.m.

CHAIRPERSON GRIFFIS: Excellent. To
continue, of course, today's hearing agenda are
available for you. They are located at the wall where
you entered into the hearing room.

I would ask that everyone turn off their

cell phones and beepers at this time, so that we don't have a disruption of our transmission. Our transmission, of course, is in two forms.

One is a Court Reporter, sitting on the floor to my right, and I won't make a joke about that.

And also we are being broadcast live on the Office of Zoning's web site. So attendant to each of those, of course, we ask that you refrain from making any disruptive noises in the hearing room and also turning off all those noise-making devices.

I would ask the people who plan to testify before the Board today, fill out two witness cards. Witness cards are available at the table where you entered into the hearing room, and also the table in front of us where you will provide testimony.

Those two cards can go to the Recorder prior to coming forward to speak to the Board. You will need, of course, to introduce yourself with your name and your address once, so that we obviously have your correct name on the record.

The order of procedures for the appeal of which we have this afternoon will be as follows. We will hear first the statement of witnesses of the Appellant. Secondly, we will hear from the Zoning

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Administrator or a government official representing that office.

Third we will hear from the Owner, the Lessee or any others that are deemed appropriate within the appeal. We will then hear from the ANC. Fifth, we would hear, an opportunity to hear from other Interveners if they are established.

And sixth, we would again hear from the Appellant, any closing remarks, summations, etcetera.

I'm going to, well, cross examination, of course, is allowed by those participating in this appeal.

We will be direct on what is jurisdictional and relevant in terms of the scope of appeal, cross examination. But I'll get into that with specificity as we need to as we move forward.

The record will be closed at the conclusion of this appeal. We will be very clear if we need additional information or briefings or elements that should be submitted into the record.

But outside of that, of course, we would not accept anything else into the record once we have finished our proceedings on this appeal.

The Sunshine Act requires that this Board hold all its proceedings in the open and before the

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public. This Board does enter into Executive Session, both during or after hearings on a case.

Those are utilized for review records and/or deliberating on cases. This is appropriate under the Sunshine Act and it also is in accordance with our rules, regulations and procedures.

I think we should move just quickly on to get to our agenda this afternoon. Let me say a very good afternoon to Ms. Bailey from the Office of Zoning, sitting on my very far right.

Mr. Moy, who will sit closer to Mr. Hood here when he returns to the Board, and Ms. Glazer, representing the Office of Attorney General. I'm going to ask those that are going to be providing testimony today, please stand and give your attention to Ms. Bailey as she's going to administer the oath.

(Witnesses are sworn.)

CHAIRPERSON GRIFFIS: Good, thank you all very much. Ms. Bailey, a very good afternoon to you.

Let me ask if you are aware of any preliminary matters for the Board's attention in the afternoon session this afternoon?

MS. BAILEY: Mr. Chairman, and to everyone, good afternoon. No, sir, at this point there are no

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preliminary matters.

CHAIRPERSON GRIFFIS: Good. Is there anyone in attendance that have preliminary matters for the Board's attention prior to calling our first case in the afternoon?

MS. BROWN: Good afternoon, Mr. Chairman and members of the Board. For the record, my name is Carolyn Brown, with the law firm of Holland and Knight. I'm here on behalf of the Owner and Owner's Representative for the property in question for this afternoon's appeal case.

We do have a motion to dismiss the case based on untimeliness that we would hope the Board would entertain, and I can go through the elements of that now if you are ready to hear it.

CHAIRPERSON GRIFFIS: We have, I think, one Board issue, preliminary matter, that I think would be more appropriate if we call the appeal and then we'll pick up the motions.

MS. BROWN: Thank you.

CHAIRPERSON GRIFFIS: We also, and hopefully you were served the Appellant's reply to that motion to dismiss?

MS. BROWN: Yes, sir, I did get a copy of

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that.

CHAIRPERSON GRIFFIS: Okay, so it looks like we'll have a little bit of discussion on these preliminary matters. So why don't we do that, and Ms. Bailey, if you're prepared, we can call the case for this afternoon and move ahead and do these issues.

MS. BAILEY: Mr. Chairman, the only case this afternoon, is Application Number 17329 of the Georgetown Residents Alliance. This is an appeal case and it's pursuant to 11 DCMR, 3100 and 3101, from the administrative decision of the Department of Consumer and Regulatory Affairs.

The Appellant alleges that DCRA erred by refusing to enforce Subsection 2002.3, that is extension of nonconforming uses within structures of the zoning regulations and exceeded its authority by issuing a permit for the demolition of a roof turret and roof structures.

The property is zoned R-3, and it's located at 1531 31st Street, N.W., Square 1269, Lot 294.

CHAIRPERSON GRIFFIS: Excellent. Thank you very much. Is the Appellant present?

MR. CROCKETT: Members of the Board, my name is Don Crockett, I'm the Appellant. And I live at

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CHAIRPERSON GRIFFIS: Excellent. Mr. Crockett, the Board just had a couple of quick questions and I think we can get to the bottom of it very easily.

And I have some direct questions, and that is, as we look at this appeal and the substance of the appeal, what helps me is to frame it in my mind in a very simple, almost bullet-point items of what is being appealed.

So, what I'm asking you is can you tell me, specifically, the elements that are being appealed, and how they are directly related to 11 DCMR, or the zoning regulations?

MR. CROCKETT: I will do my best to do that.

The issue in this case is the refusal of various officers of DCRA, including the Director of DCRA, himself, to take any action whatsoever, as they are required to do by the regulations, to require this, the roof structure and the demolition of a turret, at this apartment house, to be restored to its original appearance.

That is the crux of the case. And I believe that the Board has authority upon any refusal of any

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officer of the government, with respect to a zoning or a zoning-related matter, to make such orders as that officer could have made himself, had he performed his duty the way he should have.

CHAIRPERSON GRIFFIS: Okay, there's two critical aspects that I find in that. First of all, is the utilization of the word refusal in 3112.2, refusal, which I want to talk a little bit about.

But let me understand, first of all, how the rebuilding or restructuring of the turret, or that which was demoed on the structure, as I don't have plans or diagrams, I don't know all the specifics.

But in using your submissions and your words today, where is the zoning area that's impacted there?

For instance, did the turret go to height of the structure?

MR. CROCKETT: I know, Mr. Griffis, the zoning attachment is that it was demolished without a building permit. And of course the requirement for a building permit is the primary cornerstone of the zoning regulations.

Without a building permit, a building without a permit is a flagrant violation of the zoning regulations.

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CHAIRPERSON GRIFFIS: Isn't it of all building regulations? I mean isn't it also the building code in anything, in anything else, isn't it also a violation of -

MR. CROCKETT: Well, that's true, that's true, but the requirement for a building permit is in the zoning regulations. So it is a zoning requirement to have a building permit.

And if you don't have a building permit, then it's a violation of the zoning regulations.

CHAIRPERSON GRIFFIS: Well, it seems like we have a definitive ruling on that. Ms. Glazer, do you recall the case that dealt with whether a building without a permit was an appealable element before the BZA?

MS. GLAZER: Mr. Chair, I think within the last six months to a year, the Board has had two occasions to consider that question, and has determined that a building without a building permit was a violation of the Zoning Act, rather than the zoning regulations.

And therefore the Board, this Board had no jurisdiction over appeals stemming from those violations. I don't recall the names of those cases.

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One of them was Choharis, C-h-o-h-a-r-i-s, I believe.

MR. CROCKETT: Well, Mr. Griffis, my appeal here is somewhat different.

CHAIRPERSON GRIFFIS: Indeed.

MR. CROCKETT: It is not, I mean the violation of the zoning regulations was building without a permit. There was another regulation related to zoning, which was also violated, and this is in the Historic Preservation Act, that precludes a permit from issuing unless it is issued under certain circumstances with respect to homes and structures in a historic area.

And that is also part of, relates into the zoning because you can't get a building permit without complying with the Historic Preservation requirements, the specific ones for these particular buildings.

CHAIRPERSON GRIFFIS: Okay. And for my understanding, when, I understand the framing of your argument. What is the exact section in 11 DCMR, which I would go to that would say, all right, clearly the Zoning Administrator erred in issuing or not issuing or taking non-action or action?

MR. CROCKETT: It's DC Code Section 6-1105, which sets forth the requirement. And DC Code Section

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6-1110, sets forth the requirement, the relief that is to be accorded the government, which is that the government is responsible for ordering the person who built without the proper permit, to restore the property to the, to its appearance before the construction.

CHAIRPERSON GRIFFIS: Okay, and -

MR. CROCKETT: This only refers to exterior alterations in a historic district or to a historic landmark.

CHAIRPERSON GRIFFIS: What is DC Code 6?

CHAIRPERSON GRIFFIS: Historic Preservation.

CHAIRPERSON GRIFFIS: Oh, so it's DCMR, Title 6?

MR. CROCKETT: No. It is DC Code.

CHAIRPERSON GRIFFIS: It's actually a DC Code.

MR. CROCKETT: In DC Code obviously controls in this situation because the regulations issued either by the Zoning Commissioner and the other agency cannot, you know, overrule what the law requires, which is that when any, when anything is built without a permit on it, in a particular, in the Georgetown Historic District -

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CHAIRPERSON GRIFFIS: Right.

MR. CROCKETT: - on the exterior without a permit, then the government is required to order that the destruction or construction be restored to its appearance.

CHAIRPERSON GRIFFIS: Isn't the appropriate body to appeal a violation of DC Code 6, is the appeal body of DCRA, or more directly asked, how are we the jurisdictional body to hear an appeal of a violation that's noted under DC Code 6?

MR. CROCKETT: Because it's the responsibility of various agencies within DCRA, to enforce these regulations, both the zoning regulations and the related regulations, they are related to the zoning regulations because they are related through the permit.

CHAIRPERSON GRIFFIS: All right, I understand that.

MR. CROCKETT: And your authority speaks in terms of zoning regulations and regulations related to zoning. That is the authority of this Board, and it seemed clear to me that when all of the officers of the DCRA ultimately refused to do anything.

And that is the Director, himself, the

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Chairman of the Historic Preservation Review Board, the Office of Historic Preservation and the Zoning Administrator. When all of those finally did nothing, that is when I filed this appeal. And I believe this Board has jurisdiction.

CHAIRPERSON GRIFFIS: Okay, that being said -

MR. CROCKETT: It was basically a refusal of all of those entities -

CHAIRPERSON GRIFFIS: Right.

MR. CROCKETT: - that are responsible for the zoning and the building permits, to act.

CHAIRPERSON GRIFFIS: And it brings up some others here, but I don't want to forget my first one under 3112.2, you're utilizing the word refusal as in refusal to take an action.

However, I needed to be persuaded, and I'll let others also speak to this. I need to be persuaded that refusal isn't actually an active word, and not describing a non-action.

Meaning, and I read this, any person aggrieved by an order, requirement, decision, determination or refusal. It's almost, as I read this, that refusal is a denial, right, made by an Administrative Officer or body.

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So if I am refused a Certificate of Occupancy because of a use not being allowed or refused a permit for something, that that might be an appealable element to the Board.

But what I understand you saying, and in your submissions, your words today is that the fact that the Director, the Chairman and the Zoning Administrator did not act, is actually an appealable decision of some sort before us. Am I understanding you correctly?

MR. CROCKETT: Yes, sir, and I think that's a common thing in the law. Although public officials are many times required to document their decisions, many times they don't.

And when you find yourself in a situation where the official refuses to even answer requests such as this, for them to enforce the law that it is by definition their refusal to even respond, is a refusal of the request to have them act.

And I think that's what, the way it should be looked at in this case. I mean I asked the, I wrote three letters to the Chairman of the Historic Review Board, asking him to look into the situation and take action.

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Which, I believe, that the Board has the right to do. He never responded to one of those. Instead, Mr. Dennee, of the Office of Historic Preservation, we were in constant communication throughout this period.

He would respond to these letters, because I sent him copies. I sent copies of these letters to everyone involved, including the Director of the DCRA and everybody else who had any involvement in the failure to take care of the situation.

Mr. Dennee, in his last communication to me, which -

CHAIRPERSON GRIFFIS: Of February 21st?

MR. CROCKETT: Well, no, I didn't get a communication from him after, that was before. In my February 21st communication to him was to point out that he hadn't addressed the question of the unlawful demolition of the turret, but he told me that he had instructed the, I guess it must be the, well see, he had instructed some Department not to issue an occupancy permit until the stair structure was taken down and replaced with a hatch.

And that was the communication. Then I wrote him another letter and that was the one on the

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21st, where I asked him to address also the matter of the destruction of the turret.

He did not respond to that and that was the end of the game. That was the last rejection. I mean it was a rejection because he didn't respond, and that's when I filed the appeal.

CHAIRPERSON GRIFFIS: So, included in the substance of your appeal, if we move on with this, we will be taking jurisdiction over Mr. Dennee's action or non-action. Is that your understanding?

MR. CROCKETT: DCRA. Mr. Dennee is a subsidiary, his office is a subsidiary office of DCRA, as is the Zoning Administrator, and as is the Historic Preservation Review Board.

CHAIRPERSON GRIFFIS: So, I'm correct.

MR. CROCKETT: Each of these offices have responsibility that are essentially zoning responsibilities.

CHAIRPERSON GRIFFIS: Do we think that Mr. Dennee understands zoning law, in terms of review and approval of permits?

MR. CROCKETT: I have no idea, whether Mr. Dennee understands -

CHAIRPERSON GRIFFIS: The question, and is

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just for my understanding, you do believe then that Mr. Dennee's action or inaction is one of the elements of substance under appeal before us?

MR. CROCKETT: Yes.

CHAIRPERSON GRIFFIS: Okay. All right others? Questions?

VICE CHAIR MILLER: I'm sure that we'll be hearing from the other parties, but I just want to make a comment, thus far, that a lot of these issues seem to involve Historic Preservation and HPRB, and as far as I understand the statutory framework, an appeal of an HPRB decision or Historic Preservation issue, is not in the BZA.

I believe it's to the Mayor's Agent. And I understand that you are reading from the DC Code, and I heard you say that the government or something. We're not the government, we're not the whole government, you know.

I mean it may be, there are other bodies that may be appropriate to hear the appeal, but with respect to the Historic Preservation, as far as I understand, we do not have jurisdiction over that.

MR. CROCKETT: I would just, I would repeat again the reason that I do believe the Board has

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jurisdiction. And that is because of the issuance of a building permit is a requirement of the zoning regulations.

CHAIRPERSON GRIFFIS: Right. I think, I understand that. And I think the Board, we've actually an, numerous appeals that have this discussion in it, and here's how I understand it, whether it's correct or legally put or not.

But certainly, in our regulations, you have to have a permit issued, right? And that permit, and part of DCMR 11 looks at it to say that permit can only be issued as a Certificate of Occupancy, if it complies with this Title, Title 11.

So what that does is it narrows us. All of a sudden there's all these building codes and life safety and all these reviews that happen for a permit to be issued to go out the door to go and do a construction.

But for us, it narrows it all of a sudden down to what do we look at? We look at height, we look at lot occupancy, we look at side yards and rear yards. And those are the narrow elements, as well as others, that are enumerated in use.

But those are the narrow elements of which,

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one, the Zoning Administrator looks in terms of approving a permit. And therefore, those are the actions or those are the direct actions, as it relates to issuance of permit, that are appealable to this Board.

So, for instance, in the steps as I understand it, loosely, if you were in a Historic Preservation area and went to pull a permit, you would have to have review by the Preservation Officer, and then that would be signed off and then it would go to DCRA for further review.

I'm not sure the Zoning Administrator or the zoning elements are required to make sure that there's compliance with the preservation laws, but rather there are separate entities that are jurisdictional in their review of those elements.

MR. CROCKETT: Yes, in other words, before a permit is issued, it has to travel up to the Historic Preservation Review Board.

CHAIRPERSON GRIFFIS: Right, and you're asserting that that didn't happen?

MR. CROCKETT: Well, none of this happened, because there was no permit at all. I mean we are looking at a situation here -

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CHAIRPERSON GRIFFIS: But then doesn't that become an enforcement element of DCRA for illegal construction or construction without a permit?

MR. CROCKETT: Well, yes. And that is precisely the point that DCRA, including all its elements and including the Zoning Administrator, have an obligation to issue orders to enforce the zoning regulations. And the primary focus of the zoning regulations is the fact that you have to have a building permit.

If you have no building permit, then that is a violation of the zoning regulations, regardless of what internal requirements are. That's just a flat out violation of the zoning laws and the refusal of DCRA, which is an agency responsible for the zoning regulations, to do anything about it, is, I believe, reviewable by this Board.

And this Board has authority to issue orders in the, that any person, that any officer could have issued if he'd done his duty. And that seems to me to be a fairly simple proposition and it didn't occur to me that the Board would not feel that some responsibility for when the Zoning Administrators and other under the DCRA just looked the other way and

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refused to do anything when the zoning regulations were being violated.

And totally refused to act and do anything.

CHAIRPERSON GRIFFIS: I don't think we're unsympathetic or not wanting to be responsive, but I think that we are, we have to establish whether we actually have jurisdiction or not.

MR. CROCKETT: I agree.

CHAIRPERSON GRIFFIS: All right, Ms. Miller.

VICE CHAIR MILLER: Well, I think part of what we're trying to do here is figure out if you have a zoning issue and what it is. Because now I hear two things.

When I looked at your Exhibit 11, I think it is, yeah, you said that the appeal was DCRA has failed and refused to take any action to abate the illegal turret demolition.

But now I hear you saying something like they should have issued a building permit. So I -

MR. CROCKETT: Oh, no, no, you must have misunderstood me.

VICE CHAIR MILLER: Okay.

MR. CROCKETT: My complaint is solely the failure of DCRA and its subordinate agencies, to

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require enforcement of the zoning regulations. In other words, if somebody builds without a permit, as in this case, they are required to do something.

VICE CHAIR MILLER: So what zoning regulation, in this case?

MR. CROCKETT: Well, specifically, 3202.1, which says except as provided in Sections 3202.5, 3202.7 or 3202.8, a building permit shall not be issued for a proposed direction, construction, conversion or alteration of any structure unless the structure complies with the provisions of this type.

CHAIRPERSON GRIFFIS: Okay, I think what Ms. Miller is pushing you to, so what's that next answer? What in this Title 11, DCMR, did it not meet?

What element of the zoning regulations did this not meet? Or do you assert that it doesn't meet?

MR. CROCKETT: I just assert that since a building permit is the cornerstone of the zoning regulations, you can't have any zoning regulations unless you have a building permit.

And when somebody builds something without a permit, I think it's up to the people administering the zoning laws to enforce them.

CHAIRPERSON GRIFFIS: Yes, Mr. Hood.

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MR. HOOD: I'm just not clear. I really don't think, I haven't seen yet, Mr. Crockett, where we, exactly, you haven't convinced me yet where this Board exactly has jurisdiction. I'm not convinced and I don't know how much more you can tell me that would convince me this is within our jurisdiction.

Because we're not an enforcement body. I don't know how much more you can tell me, but right now, I'm just letting you know, I'm not convinced.

CHAIRPERSON GRIFFIS: I think that's an interesting aspect to bring up, and that is of enforcement. Because if, as, I think as substantively asserted by you, that there was construction that happened without proper permits.

Although we cite in our regulations 3202, that they have to, every permit needs to be issued, has to comply with the regulations.

But that doesn't totally incorporate the enforcement of whether a permit was issued or not issued. So the enforcement mechanism, as you're saying, Mr. Hood, is it is more of an enforcement idea that we should go out there and find those that are building without permits or proper permits, or building in accordance to permits.

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MR. HOOD: Case in point, Mr. Chairman, he mentioned 6-1105, I started looking towards the regulations.

CHAIRPERSON GRIFFIS: Right.

MR. HOOD: To find out what's in the Code, and I'm being required to go somewhere else and I was found by the zoning ordinance and that's what I'm looking for.

I kind of understand your point, but I'm not there with you. I just wanted to make that clear to you.

CHAIRPERSON GRIFFIS: Okay, questions?

VICE CHAIR MILLER: I'm just trying to zero in on your appeal. Is your appeal that there was demolition without a permit?

MR. CROCKETT: There was both demolition and construction without a permit.

VICE CHAIR MILLER: Okay, that's your appeal?

MR. CROCKETT: Yes.

VICE CHAIR MILLER: And you know the dates of those?

MR. CROCKETT: Sometime in November of 2004.

VICE CHAIR MILLER: Okay, thank you.

CHAIRPERSON GRIFFIS: Okay, any other

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questions at this time?

(No response.)

CHAIRPERSON GRIFFIS: Good, then let's hear.

Yes.

MS. BELL: I think we would like to be heard on this if the Board would entertain some discussion?

CHAIRPERSON GRIFFIS: Lucky I asked.

MS. BELL: Thanks. Good afternoon. I'm Lisa Bell with the Office of the General Counsel at DCRA. I think one of the problems with the Appellant's argument in this case is that he is seeking to attribute an error to the Zoning Administrator's inaction.

In this case he apparently has identified what he believes to be construction on the roof and the Zoning Administrator and various other DCRA officials that have reviewed his correspondence, their failure to agree with him that a permit should be issued, is in effect, what he's referring to as reversal.

In our view, however, we interpret the zoning regs and the Board's jurisdiction to relate to those situations where the Zoning Administrator has actually acted.

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In other words, where he as either issued a permit or has signed off and approved a permit that was subsequently issued by BLRA. Or when he has issued a decision, an administrative decision, in his capacity, in which a party believes that they have been aggrieved or wronged or has been an incorrect proposal, or excuse me, a proposed incorrect assessment of the zoning regulations.

Because, as you know in the past, the Zoning Administrator did issue concurrence letters, agreed with concurrence letters and a number of other things.

VICE CHAIR MILLER: Since you're pausing, can I ask you did the Zoning Administrator issue any kind of letter indicating they didn't agree with his position?

MS. BELL: No, not in this case. That's why I mentioned that, because I know the Board has, that has been an issue in the past and obviously that's been an issue in the agency.

VICE CHAIR MILLER: But, in your view, no such letter was required?

MS. BELL: In my view, no such letter was issued.

VICE CHAIR MILLER: Okay.

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CHAIRPERSON GRIFFIS: Required?

VICE CHAIR MILLER: Requires that regulation that requires them to respond to every, I don't know, letter indicating a different opinion or asking for an opinion.

CHAIRPERSON GRIFFIS: Have you ever heard of such a thing?

VICE CHAIR MILLER: No, I haven't.

CHAIRPERSON GRIFFIS: Do you we have such a thing?

MS. BELL: I think that the practice has been, as my understanding -

CHAIRPERSON GRIFFIS: There's no law. She's saying where is it in the law?

MS. BELL: That's correct, I don't think there is a law.

CHAIRPERSON GRIFFIS: Okay.

MS. BELL: But I think that there has been a practice that the ZA, on occasion, has issued decisions in a written form.

CHAIRPERSON GRIFFIS: Okay, no, but I, I'll bring clarity to this issue, because she's asking a much bigger thing. Legally, is every bureaucrat or official required to respond to every inquiry?

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MS. BELL: No.

CHAIRPERSON GRIFFIS: Okay, so then the second point of it is, is, that you brought up, is as we've heard in other cases in appeals, these interpretation letters by the Zoning Administrator, and are those letters appealable?

Now, that's fine, because we don't need to figure that one out. None of those are before us in this specific case.

MS. BELL: That's correct. And actually, a third point I would like to raise, that I think is important, is this issue of enforceability.

Government agencies and DCRA, as well as other subordinate agencies of the Mayor, not DCRA subordinate agencies, I think, as the Appellant has referred. We, as everyone knows, we're all a subordinate agency for the Executive Office of the Mayor. So there isn't other agencies that work for DCRA.

But that aside, the government does have the authority to enforce or not enforce under its police powers. So that's a whole larger issue and it's an administrative issue, but it's important here.

I think the Board might want to tread very

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lightly on this issue of expanding jurisdiction to include whether or not the government should have enforced, or whether it properly used its enforcement authority.

VICE CHAIR MILLER: I just want to ask you, though. If a resident wanted to appeal a demolition without a permit, would the normal course of that appeal be to the OAH?

MS. BELL: That would be our position. It would be illegal construction, and actually, and that's going back to what I'm saying about enforceability.

It would be something that we would be viewed, that the agency would view as illegal construction, and the consequently we would take action under those statutes.

CHAIRPERSON GRIFFIS: You said normally. You mean, is there a choice? So if some people want to go to HPRB first or BZA first? They could go to OAH or they could go - what is the legal remedy if you were going to deal with enforcement of illegal construction?

MS. BELL: Well, it would be under Title 7, because it would be under the Civil Infractions Act,

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which, and the appellate process for that is OAH and then subsequently to the DC Court of Appeals.

CHAIRPERSON GRIFFIS: And that actually brings us to a fascinating point, because in order to get to OAH, there would have to be a violation.

MS. BELL: A decision, right.

CHAIRPERSON GRIFFIS: There would have to be a fine.

MS. BELL: Right.

CHAIRPERSON GRIFFIS: So that there was first and foremost an action by DCRA of enforcement, going out and they're saying this is clearly illegal construction, this is your fine, or however they would do that.

Then that could, in fact, be brought to OAH as an appeal of that civil infraction by the property owner.

MS. BELL: Right.

CHAIRPERSON GRIFFIS: So all that's happening, still it's not coming to us?

MS. BELL: Yes, yes.

CHAIRPERSON GRIFFIS: I see.

MS. BELL: Now our position, and we understood the Board's position to be that only

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zoning-related matters are within your jurisdiction. So even infractions as they relate to zoning, underlying zoning matters, go to OAH. Are you thinking?

CHAIRPERSON GRIFFIS: Yeah, kind of. All right. Other questions?

MS. BROWN: Mr. Chairman, may I be heard at this point, or do you want me to chime in later?

CHAIRPERSON GRIFFIS: Let's do it.

MS. BROWN: I agree with your initial questioning about whether or not you have subject matter jurisdiction over this, and I think it does tie into Motion to Dismiss. One element of a Motion to Dismiss is the untimeliness that is briefed before you. But the second element is subject matter jurisdiction.

And clearly under the Zoning Act and in Section 3100.2, it clearly says that the Board shall hear and decide appeals where it is alleged by the Appellant that there is an error in any order, requirement, decision, determination, refusal in the administration or enforcement of the zoning regulations, limited to Title 11.

And we have not heard one citation yet today

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that says that there's any violation except this broader, umbrella issue of a permit issuance. And yet, the specific violations that we've heard today deal strictly with the Historic Preservation Law.

And you were correct, Mrs. Miller, that the appropriate appeal of that issue is to the Mayor's Agent if you are not satisfied with the results of the enforcement action.

Although, once a Stop Work Order is issued, or some other enforcement action that is, Ms. Bell correctly stated, is through the administrative appeal process to the Office of Appeals and Hearings.

The second correction I want to make on the record, is there is a permit that was issued in this case, and that was on December 28th, 2004, and is what Mr. Crockett provided to the record on April 8th, in his submission to the Office of Zoning.

And in his submission in the initial appeal, he also has e-mail correspondence from the Zoning Administrator the very next day saying we issued it because the building construction now complies with the zoning regulations, with the building permit regulations, and it is lawful construction now because it was permitted.

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And so there is no action that was refused.

CHAIRPERSON GRIFFIS: Good. And, if you wouldn't mind stating your name.

MS. BROWN: Again, for the record, Carolyn Brown from Holland and Knight, for the property owner.

CHAIRPERSON GRIFFIS: Okay.

MR. CROCKETT: Mr. Griffis.

CHAIRPERSON GRIFFIS: Yes.

MR. CROCKETT: May I interject here. I think, as she said, the appeal can relate to any enforcement issue involving zoning. And while it's true that what I just referred to were requirements that work into the zoning law for historic districts, there was also another violation of the zoning law in this particular case, because this was a nonconforming use.

It was a four-unit apartment house in a residential zone, which was nonconforming, and the zoning regulations provide that such a nonconforming use cannot be expanded into any other part of the dwelling.

I mean it is a virtual command. And by expanding, by building a penthouse and expanding the apartment building up onto the roof, that is a clear

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violation of the zoning regulations, and it was done without permits.

And I would submit that when somebody violates the, that kind of a regulation and a lot of regulations were violated here, but that was one particular zoning regulation that was violated with this illegal construction.

Then I would submit that it is the responsibility of DCRA and the zoning officials to enforce that. Otherwise, why would the statute speak of enforcement?

When I read that, I believed that I could appeal a refusal to enforce, because of that language.

And that's, that's what's happening. Very simply, we have some illegal construction that his in violation of the zoning regulations, could not be approved in any event, and nobody did anything about it. They refused to do anything.

CHAIRPERSON GRIFFIS: Two clarification questions I need to ask. And that is how, what is the manner in which you are asserting that this use was expanded into other parts of the building?

And is that, and then the second, I guess, is related, and you said, and it was not done with

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permits. So you're saying there's work outside of that which is shown or described in the permit attached to your submission?

MR. CROCKETT: No. This entire appeal focuses on two things. The removal of the one half of the turret, and the construction of a penthouse up through the attic and into the roof. The penthouse is the size of a small room, taking stairs into a walkout penthouse onto the roof, which is about the size of a small room.

And in my view, that is an expansion of the nonconforming use. And the regulation, it seems to me, is quite clear, there shall be no expansion of a nonconforming use.

CHAIRPERSON GRIFFIS: Okay, so let's go, okay, so, I'll give you that. That's an articulated discussion. So, what decision, who's decision, then, is the basis of your appeal that allowed that to happen?

MR. CROCKETT: All of the above. I mean I tried everything I could.

CHAIRPERSON GRIFFIS: Well, it would have to be the Zoning Administrator, I'll give you that. So it's the Zoning Administrator's opinion of issuing the

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permit based on the fact that that Zoning Administrator decided that that wasn't an expansion of a nonconforming use. Is that, is that reconcilable with you?

MR. CROCKETT: I really don't know what the Zoning Administrator decided.

CHAIRPERSON GRIFFIS: Okay.

MR. CROCKETT: I only know what he did.

CHAIRPERSON GRIFFIS: What I say he did, for our purposes and jurisdictional purposes is he issued a permit.

MR. CROCKETT: He issued a permit for a hatch on top of the unlawful structure, yes.

CHAIRPERSON GRIFFIS: What makes the structure unlawful?

MR. CROCKETT: It was built without permits. And it was also in violation of the expansion of a nonconforming use, those two things.

CHAIRPERSON GRIFFIS: Go ahead.

VICE CHAIR MILLER: Okay, so attached to Exhibit 11 is this permit. And is it your position that this permit was, that the ZA erred in issuing this permit?

MR. CROCKETT: Well, yes, I think it's an

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obvious error for the Zoning Administrator to have issued a permit to make alterations to illegal construction.

I think that's, you know, that's just highly unlawful for him to have done that, when he should have followed the zoning regulations, and instead required the, instead required the Builder to, you know, take all that construction down and make it the way it was.

VICE CHAIR MILLER: Okay. Again, I'm in that position where I'm just trying to identify what your appeal is. So, and we're saying, I think, that we need to look at a definitive action by the Zoning Administrator related to one of our zoning regulations in 11 DCMR.

And so I have this permit here that you've attached, so, I just want to make sure, so your appeal is of this permit, correct? I mean there may be something else.

MR. CROCKETT: Well, it is, it is the fact that the permit should not have been issued because it was, because there was no basis for issuing it for various reasons.

VICE CHAIR MILLER: That's okay, I don't need

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to hear all, we don't need to hear -

MR. CROCKETT: All the reasons we have discussed.

VICE CHAIR MILLER: It's not the reasons that I'm looking for now. It's just like what it is we should be looking at that you're appealing. So -

MR. CROCKETT: It was not the affirmative action that -

VICE CHAIR MILLER: It's not this permit, then?

MR. CROCKETT: - he took. I mean, the idea, you know, it wouldn't help my case any for him to revoke that permit and take off the hatch and the door. I mean those are minor alterations to the illegal demolition and the illegal construction. That is beside the point.

CHAIRPERSON GRIFFIS: Maybe it would help us to understand what you think would be the remedy and what actually is the, your cause of concern?

MR. CROCKETT: Well, the remedy would be to require the Builder to restore the turret to its, the historic turret to its original condition.

CHAIRPERSON GRIFFIS: Okay, the turret.

MR. CROCKETT: To its original appearance.

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CHAIRPERSON GRIFFIS: So there was a turret there. It was altered.

MR. CROCKETT: Half of the turret was taken down to make room for a roof deck.

CHAIRPERSON GRIFFIS: Something else went up in its kind of, its reconfigured place?

MR. CROCKETT: No. It was just removed to make space for a roof deck. So in its place is just flat roof.

CHAIRPERSON GRIFFIS: Okay.

MR. CROCKETT: This was, you know, of course the Old Georgetown Board rejected those plans and told the Builder he couldn't do it, and he built it anyway.

He did that anyway. He destroyed the turret after he'd been told by the Old Georgetown Board that he couldn't do it, and he had been refused. So no permit was issued.

When the permit was issued, it was for interior work only. This was exterior work on the roof. He also built this large penthouse.

CHAIRPERSON GRIFFIS: Outside of not issuing a permit for that work, are there any zoning elements that you're aware, covered under DCMR, Title 11, that go to relate, relate directly to the removal of the

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turret or the creation of a roof deck?

MR. CROCKETT: With respect to the removal of the turret, I believe a building permit was necessary to do that demolition.

CHAIRPERSON GRIFFIS: I know. Outside of the permit -

MR. CROCKETT: Okay, I'm sorry.

CHAIRPERSON GRIFFIS: - is there any zoning elements?

MR. CROCKETT: With respect to the construction of the penthouse and the walkout stairway, that, in my view, is an unlawful expansion of a nonconforming use, which is a zoning violation.

And which the DCRA was, should have been responsible for rectifying. Whether it's the Zoning Administrator or the enforcement arm of -

CHAIRPERSON GRIFFIS: Let me see if I can get to the basis of, you know this building fairly well, is that correct, in its use?

MR. CROCKETT: Yes.

CHAIRPERSON GRIFFIS: In its history of use?

MR. CROCKETT: Yes.

CHAIRPERSON GRIFFIS: And its current use, okay. Was there any portion of this, prior to the

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construction, any portion in the area that had different types of uses? Was there a, you know, an ice cream store in one section or a cobbler or a peddler or something?

MR. CROCKETT: No, this is -

CHAIRPERSON GRIFFIS: It's residential.

MR. CROCKETT: In this, in this, this is one of the only exceptions, there are a few exceptions in this area where a large house had been divided into, a single-family house had been divided into four apartments.

CHAIRPERSON GRIFFIS: Okay.

MR. CROCKETT: That's what had happened to this. It happened before the, you know, the zoning regulations -

CHAIRPERSON GRIFFIS: Okay, good enough. Okay, so for my understanding, it was 100 percent residential, although it's nonconforming use in terms of its density of residential?

MR. CROCKETT: That's right, it was a four-unit apartment house which is a nonconforming use.

CHAIRPERSON GRIFFIS: And were there any portions of that building or area or land or site that were used outside of those four units?

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MR. CROCKETT: No. There is no yard on this building. There was a small, little space out on the street and that is it. And there certainly was no use of the roof.

CHAIRPERSON GRIFFIS: And so your reading of 2002, DCMR 11, is that just an addition to the structure would be an expansion or an alteration to the structure would be an expansion of a nonconforming use?

MR. CROCKETT: Well, you could alter the structure without expanding it. But when the alteration expands it, then it seems to me it's a violation of the zoning regulations.

CHAIRPERSON GRIFFIS: Okay. Go ahead.

MR. CROCKETT: I guess I understand where you're, where you're looking at this. You're looking at it more narrowly than I did. When I looked at it, it seemed to me that it wasn't just the Zoning Administrator, but that it was DCRA itself.

CHAIRPERSON GRIFFIS: Right.

MR. CROCKETT: With all its, the Zoning Administrator was just one office in DCRA, and they all were responsible, including the Director, himself, for enforcing these regulations. And they didn't do

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it.

CHAIRPERSON GRIFFIS: Right. And, you know, personally, I'd love to take jurisdiction over the entire DCRA. Throw in HPRB and Op at the same time.

(Laughter.)

MR. CROCKETT: I wish you would.

CHAIRPERSON GRIFFIS: However, that's why we always have a lawyer sitting up here with us, to make sure we don't tread into difficult waters.

But in all seriousness, I do mean that. It's important for us, obviously, to take steps because we have seen this and even more complicated issues, not that that has any pertinence to bring this up, except that we have to go through these steps to see whether we have jurisdictional authority especially when you look at elements of enforcement or civil infractions or in a case somewhat like this. Ms. Miller.

VICE CHAIR MILLER: Ms. Brown, did the issue of the turret come before the Historic Preservation Review Board?

MS. BROWN: Old Georgetown Board of the Historic Preservation Review Board, frankly I didn't look into the whole history of that. I understand

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that it was approved, the building permit was approved.

And based on the information that was supplied by the Appellant, there was plenty of correspondence with Tim Dennee saying that he had no problem with this because it was not visible from the street and he was able to authorize the issuance of the permits.

But since this appeal focused on zoning issues, that's what I prepared for.

VICE CHAIR MILLER: Right, okay, thank you, that's fine.

MR. CROCKETT: Well, let me speak to that. The order of the Old Georgetown Board is included as Exhibit A to my application. And it states recommend against issuance of a permit for proposed roof decks and roof access which, as noted on the visit of, site visit of 21 September, 2004, will be visible from public space and not appropriate to the historic district.

CHAIRPERSON GRIFFIS: I need a little clarification. Actually, I probably should have started with that. I don't have any exhibits on your submission at all.

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In fact, there is a note of, indicating photographs in the appendix of your statement which I also don't have.

MR. CROCKETT: Well, that is a mystery to me, Mr. Griffis, because when I filed this I brought down the original with, two originals with color copies and 20 other copies as, so I have no idea what happened to them.

CHAIRPERSON GRIFFIS: Well, we're going to find out. Okay. Okay, so, you were reading what? The statement of the Old Georgetown Board?

MR. CROCKETT: Yes, I was reading from the Old Georgetown Board order in this case, I believe of September 21, 2004.

MS. BROWN: Mr. Chairman I will raise an objection to this, because it does go beyond your jurisdiction and we seem to be getting into the merits of the case when we have a Motion to Dismiss as a preliminary matter, and your own question of whether or not you do have jurisdiction.

So I would request we refrain from discussions on the preservation angle.

VICE CHAIR MILLER: I just want to comment, just because I may have opened the door here, but it

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seemed to me that we don't know that much about the substance here.

It sounded like a lot of it really dealt with HPRB, so I was just interested whether, what HPRB dealt with.

CHAIRPERSON GRIFFIS: Right, but I don't think -

VICE CHAIR MILLER: We don't have to go into detail.

CHAIRPERSON GRIFFIS: I would uphold the objection based on the fact that, yes, going into whether the decisions of the Old Georgetown Board or not, and whether it was approved or not, goes well beyond, not only our jurisdiction, but I would say, frankly, perhaps our own personal understanding of the processing.

And certainly this Board isn't set up as a Historic Review Board or a Design Review Board. So, all and all, I don't see that the relevancy would go directly to establishing jurisdiction in this appeal.

Okay, it's in the record, there it is. We're going to pass this around. We're going to take a few minutes - all right, what I want to do is one more round. We will hear from government if they have any

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additional comments or discussion for the Board's iteration on jurisdictional authority for the Board. We'll go to Ms. Brown and then we can have summations.

Maybe, Mr. Crockett, hopefully we'll get to a point of decision or at least some sort of direction from the Board. Oh, boy, we're going to need copies of this. Okay, do you have anything additional?

MS. BELL: Actually, I'm still not terribly clear and so I would like to ask the Board if they could ask Mr. Crockett again if he could narrow what he perceives his issue is.

What I thought I understood now is that he's saying any use of the roof, other than its original condition. That is any access to the roof is an expansion of what, of a nonconforming use of this building, is as I understand it.

CHAIRPERSON GRIFFIS: Well, I think, maybe this would help. The way I would pose the correction, and Mr. Crockett, here it is. Is you're asserting that is an illegal expansion of a nonconforming use?

MR. CROCKETT: Yes.

CHAIRPERSON GRIFFIS: Who allowed this to happen and by what action did it happen? In converse, for instance, clearly it would have been the Zoning

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Administrator reviewed, issued a permit and now you're refuting that that was an appropriate approval by the Zoning Administrator?

Or, are you asserting that somehow the ZA didn't realize what this was, so did not deny it. And that's the action that is under appeal.

MS. BELL: If I could just interject with something, there's also a third issue. The ZA didn't, the permit wasn't issued for a roof deck, so, you know, he seems to, I guess he's objecting to the access to the roof to do anything.

CHAIRPERSON GRIFFIS: Right, that's why I didn't say any of those things.

MS. BELL: Oh, okay, okay.

CHAIRPERSON GRIFFIS: I said the permit, and then there's an action of issuing that permit. And if that permit issued, everything is revolving around the permit. There has to be some sort of concrete, I don't know, element around which there was some zoning action taken or not taken, which is your point, was not taken.

MR. CROCKETT: After the Old Georgetown Board rejected the plans to demolish the turret, build this large stair structure in the roof, walkout structure,

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and issued a building permit for interior work only, then the owner went ahead and he followed those plans that had been rejected by the Old Georgetown Board.

He demolished the turret to make room for the deck and he built this large penthouse structure.

VICE CHAIR MILLER: Okay.

MR. CROCKETT: And that is, that, in my view, is contrary to the zoning regulations.

VICE CHAIR MILLER: Can I interrupt you, because we really are trying to fine tune what your appeal is. So you don't have any problem, it sounds like, with the permit that DCRA issued, which was for interior work only. Is that correct?

MR. CROCKETT: No problem with that.

VICE CHAIR MILLER: Okay, what it sounds like you have a problem with is the demolition work that was done by the property owner, which you said is in violation of the decision by the Georgetown Board, and beyond the scope of the permit, perhaps. Is that what you think?

MR. CROCKETT: Well, it's, as you say, the Old Georgetown Board doesn't have anything to do with it, as a result, because DCRA did not issue a permit for this because of Old Georgetown Board recommended

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against it.

VICE CHAIR MILLER: Okay, so -

MR. CROCKETT: The permit was for interior work only.

VICE CHAIR MILLER: So then it sounds like what you're saying is that the property owner's demolition was beyond the scope of the permit, and wasn't allowed.

MR. CROCKETT: Yes.

VICE CHAIR MILLER: Which is illegal construction.

MR. CROCKETT: Yes. And at the same time, the stair structure, the stair structure which is as large as a room, violated the zoning regulations because it was an unlawful expansion of a nonconforming use.

CHAIRPERSON GRIFFIS: But that's just, was it covered under one of the permits that you are talking about?

MR. CROCKETT: No.

CHAIRPERSON GRIFFIS: So it also is encompassed in your understanding of what the illegal construction was?

MR. CROCKETT: The interior work only. You

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can't pop up a new room through the roof and say that's interior work only.

CHAIRPERSON GRIFFIS: Correct. So it's part of what you're categorizing as the illegal construction?

MR. CROCKETT: Right.

CHAIRPERSON GRIFFIS: Okay.

MR. CROCKETT: Now I really took a close look before filing this, at 3100.2 of the zoning regulations, and it seemed clear to me that it was very, it was very broad authority for this Board.

It says the Board, pursuant to the Zoning Act, shall also hear and decide appeals where it is alleged by the Appellant, that there is error in any order, requirement, decision, determination or refusal made by any administrator officer or body, including the Mayor, in the administration or enforcement of the zoning regulations.

Okay? So it isn't just people within the Zoning Office, it's even the Mayor.

CHAIRPERSON GRIFFIS: Absolutely.

MR. CROCKETT: It's any officer or body that is involved in the administration of the zoning regulations. And the enforcement. And I read that

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broadly, I really did.

I read that as DCRA, and that was how I read it, that is how all this occurred and that's basically why I filed the appeal the way I did.

CHAIRPERSON GRIFFIS: Indeed. And I understand that, and think it is, it's a logical approach. However, I believe that case decisions by this Board and also court cases have actually defined that narrowness that is the intent and the writing in the regulation.

And that is that there are other appealable bodies for other elements. Although the zoning regulations, of course, are part and parcel of all, of larger construction, and often reference other elements of DC Code or life safety.

For instance, the whole point of the intent or the general description of what zoning regulations are go deep into life safety, health code, building codes.

However, that does not make DCMR 11, or the zoning regulations jurisdictional over all of those other aspects.

MR. CROCKETT: Oh, I agree with that. I was just looking at enforcement of the zoning regulations.

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CHAIRPERSON GRIFFIS: Exactly. But see, by your own statements you are indicating that with that small paragraph and a broad reading, as you've said you did a very broad reading, it allows us to go into the jurisdiction of entire DCRA, which I have great difficulty seeing the legal path of which we could follow to get there.

And, even in a closely linked aspect as Historic Preservation or Design Review, and the zoning regulations are that also, has I think a very bright line or distinction between what we review, what they review and therefore what is appealable to us and what is not appealable to us.

So far, Mr. Hood, has said it several moments ago. I still don't see what is rising to a zoning issue that would be appealable in this circumstance.

The last thing I think we need to perhaps investigate very quickly, Mr. Crockett, do you know what the Stop Work Orders were issued for?

MR. CROCKETT: No, and they don't really show. In fact, I never saw the last one because it was put up and taken down in a day, before I even saw it.

CHAIRPERSON GRIFFIS: Well, one was from

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Historic Preservation, was it not?

MR. CROCKETT: The first one was from an Inspector of the Office of Historic Preservation who issued the Stop Work Order for all the work on the roof.

CHAIRPERSON GRIFFIS: Okay.

MR. CROCKETT: The second -

CHAIRPERSON GRIFFIS: Clearly, that wouldn't be jurisdictional to us.

MR. CROCKETT: The second Stop Work Order was issued by an Inspector that, a DCRA Inspector that the Zoning Administrator sent out.

CHAIRPERSON GRIFFIS: Ms. Brown, are you aware of what the second Stop Work Order was issued for?

MS. BROWN: The only evidence in record that addresses the Stop Work Orders presented by the Appellant, is the e-mail correspondence from Toye Bello dated, I believe, December 29th, 2004.

In it he describes sending an Inspector out on December 27th, to the site, that they issued an immediate Stop Work Order that took place within a 24-hour period.

That the Applicant came back in, I think the

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application is dated December 27th, to get the construction permitted properly. On December 28th, that permit was issued.

CHAIRPERSON GRIFFIS: Okay.

MS. BROWN: So whatever allegation there is of illegal construction, it was cured.

CHAIRPERSON GRIFFIS: Is it your understanding that Stop Work Order on December 27th, 2004, was for the violation of 2002, which was the nonconforming uses within structures?

MS. BROWN: To my knowledge there has never been a citation for, I'm sorry -

CHAIRPERSON GRIFFIS: 2002.

MS. BROWN: - 2002.3, the nonconforming structure section, no, there's never been an allegation by the city that there's been a violation of that provision.

CHAIRPERSON GRIFFIS: Okay, so you don't know what the substance of the Stop Work Order was?

MS. BROWN: My understanding was, based on the permits and from information provided me from the owner, was to get the turret construction permitted and the roof hatches permitted.

And I think the exact wording on the permit

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is a roof access door, a mechanical access door and a roof hatch.

CHAIRPERSON GRIFFIS: Okay, I'm sorry. Clarify for me. You mentioned something about the correspondence between Mr. Bello, who would have been the Zoning Administrator at that point?

MS. BROWN: Yes, and I can find a citation for your fairly quickly. It is part of the Appellant's stamped pages, Number 18. It's e-mail correspondence from Toye Bello on December 29th, at 11:20 a.m. It should be in your packet marked as that.

I can read it for you if you want, but if you, okay. DCRA and the Zoning Division have indeed focused on the problem at the subject address, 1531 31st Street, is the address they're talking about.

In distinction to the Historic Preservation Stop Work Order, which permitted interior work to continue, this office issued a Stop Work Order, 12-27, stopping all work pending abatement of the roof work that was done outside the scope of the instant building permit.

Whereas Historic's November 6th, Stop Work Order did not illicit compliance because the owner was

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allowed to continue to work on the interior, ours had brought remedy within 24 hours.

The subject property owner brought in revised plans showing only a proposed roof hatch, no roof deck and obtained a revised building permit reflective of the scope of work allowed.

Further, the owner has been put on notice that as an existing nonconforming structure, a roof deck addition is impossible without a public hearing before the Board of Zoning Adjustment.

CHAIRPERSON GRIFFIS: Okay, and that's from Mr. Bello?

MS. BROWN: That's an e-mail correspondence from Mr. Bello as the then Zoning Administrator.

CHAIRPERSON GRIFFIS: Okay, so let me ask you then, or you're asserting that there was a refusal to take action, these seem to be very, very strong actions. Stop Work Orders are very serious things during construction.

And here we have a Stop Work Order that was historic, there's no convincing that that would be jurisdictional for us, but it was removed. We now have a second one that goes directly to working outside the scope of a permit.

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And on December 27th, 2004, it's issued. On December 28th, 2004, it's removed. Now the correspondence in your submission that's being talked about is saying, look, we looked at this, there was additional documentation.

It seems to have been remedied. So here's an enforcement action and a remedy and we've continued on. So now I'm wondering, of all these actions, why, one, weren't you appealing either the issuance of the permit, the issuance of the removal of a Stop Work Order, these actions?

And then, two, how do we get beyond that? Why do we keep revisiting then that there was a refusal to take enforcement action?

MR. CROCKETT: Well, I am certainly no expert in this and it became clear to me, only after I did some legal research, what the responsibilities of these folks were.

And the permit that was issued for a hatch into the illegal, the remaining half of the illegally demolished turret, I mean a door, and a hatch on top of the unlawful expansion onto the roof, did nothing.

I mean those were just little doodles that were put on the illegal construction. The Zoning

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Administrator did not approve the illegal construction.

And, indeed, he could not approve it because of DC Code 6-1100, which requires when illegal construction takes place in a historic zone, then it must be removed and restored to the original appearance.

CHAIRPERSON GRIFFIS: Okay, well obviously -

MR. CROCKETT: So he had no power under the DC Code to retroactively approve that illegal work.

CHAIRPERSON GRIFFIS: But again you're asserting that for some reason either the Zoning Administrator overlooked or was unaware of what was going on.

However, it seems like this place was, at least on two major occasions, was walked through by Inspectors, all of which were looking at that specific area. How is it that they would not have known something was being built?

MR. CROCKETT: The Inspectors must have known, if they went out and looked, they knew what was there.

CHAIRPERSON GRIFFIS: Right, and they issued Stop Work Orders.

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MR. CROCKETT: And the Zoning Administrator didn't follow up with, in my view, the Zoning Administrator did not follow up with proper enforcement. What he did was issue a silly little permit to make minor changes to the illegal work.

And that was all he did. When, in fact, he was required -

CHAIRPERSON GRIFFIS: So there's an action. I mean the Zoning Administrator, you're saying -

MR. CROCKETT: He did take an action, that's true.

CHAIRPERSON GRIFFIS: You're saying that, in fact, you don't agree that he took a strong enough action. But he did take the action. So really now we're getting down to the fact of the matter is, this is going back to this issuance of the permit.

MR. CROCKETT: Yes, I mean that's one step in the process which didn't correct the problem.

MS. BELL: You know, in my view, from this discussion, from this argument, we're still back to the same initial point that MR. Hood raised.

The Appellant really has failed to identify any error on behalf of the Zoning Administrator. Even after, you know, a fairly detailed discussion of his

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allegations.

And, quite frankly, the frequency in which he comes back to this issue of illegal construction a enforceability suggests to me that he doesn't even quite understand what the responsibilities are of the Zoning Administrator, as distinguished from the enforcement aspect of both the building code and the civil infractions action.

So I think there really is a basis here for the Board to dismiss the appeal.

CHAIRPERSON GRIFFIS: Ms. Brown.

MS. BROWN: Yes, I would echo those comments.

Just for the record, there is no evidence in the record, any foundation to say that this, there's illegal construction.

There has been a permit issued, so I just want to note that objection for the record. But, secondly, the Applicant clearly has failed to meet its burden of proof here, that there is something to appeal.

HE was able to get to, perhaps, a section dealing with nonconformity, but he still hasn't been able to pinpoint any alleged error or any error. If you can get it to the building permit, well then we

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know that it's untimely, because that appeal should have been filed February 28th, and it was filed March 25th.

So, anyway you slice it, there's no way that we can get to this appeal. It's untimely, there's no jurisdiction for the Board to hear it.

CHAIRPERSON GRIFFIS: Okay. And in terms of your objection, we will obviously uphold it in that we have not decided or would not decide whether one was illegal construction or not.

But, to use the phraseology to know that we're all talking about the same thing, when there are assertions we obviously are using the same terms for clarity. Okay. Follow up questions?

(No response.)

CHAIRPERSON GRIFFIS: Anything? Mr. Mann.

MEMBER MANN: This is not necessarily information that's been presented before, so I'm not certain if you can answer this question. But you said there was an interior, there was a permit issued for interior work, correct?

MR. CROCKETT: Correct.

MEMBER MANN: Do you know when that permit was issued?

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MR. CROCKETT: It was issued some time in June or July of 2004. No, the permit for the interior work was issued subsequent to September 21, when the Old Georgetown Board rejected the exterior work.

MEMBER MANN: You believe that it was issued subsequent to the denial of the, umm, from the Old Georgetown Board of the exterior work. Is that what you just said?

MR. CROCKETT: I don't want to mislead you, Mr. Mann, because I do not have those permits. They were in the windows and I'm sure he got a demolition permit for the interior and then however other permits came along, I really don't know.

MEMBER MANN: I okay, I won't -

MR. CROCKETT: But I do know that the permit that was posted on the window, the general permit, and I don't know what the date was, was for interior work only.

MEMBER MANN: Okay, I won't hold you to that then, but then your recollection is then that the permit was issued for interior work, and some time after a permit was issued for interior work, this work to the exterior of the house started to occur?

MR. CROCKETT: Yes.

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MEMBER MANN: Okay, thank you. Do you know approximately, again, I know that you're not the authoritative person to ask on this, but do you know how long after the issuance of that permit the exterior work started to occur?

MR. CROCKETT: Well, the denial of the exterior work occurred on the 21st of September. I am assuming that the permit for the interior work only issued shortly thereafter. And I first noticed the illegal construction on the roof in mid-November.

And the Stop Work Order was issued sometime shortly thereafter.

MEMBER MANN: Okay, thank you.

MR. CROCKETT: And then the Builder went ahead, while the Stop Work Order was in place and he finished the whole thing off.

MS. BROWN: Mr. Mann, if I could respond.

MEMBER MANN: Yes.

MS. BROWN: I have a copy of the building permit that was issued for the interior work. It's from May and I really don't know that we can rely on anything that is being represented here on the facts because we really do need the documents here to set forth the exact details.

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MEMBER MANN: Okay, perhaps then, just, as far as my specific question goes with the chronology events, regarding when the interior permit was issued and when the construction occurred to the exterior of the building, maybe you can answer that then?

MS. BROWN: I have copies of only two permits, but I do not have copies of all the permits, so I cannot speak to all of the issues. I have one in my hand from May 17th, 2004, for all interior renovation of four-unit apartment building, interior work only.

And then in the record, provided by Mr. Crockett, is the December 28th permit, and again I cannot believe that that's the extent of all the permits issued for this property.

MEMBER MANN: Okay, I guess one thing that we can agree on. though, is that at the time the Stop Work Order was issued, construction to the interior of the building had occurred, is that correct?

MS. BROWN: I really can't answer that question because I, I don't have the documents that are part of this appeal, so I do not know.

MEMBER MANN: Okay, thank you.

MR. CROCKETT: I can answer that question

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because if this goes on, I will be a witness and testify to the fact that I went up and saw it in mid-November.

MS. BELL: If I could chime in here. I actually agree with Ms. Brown. I think if we could sort of stick to the documents. But my best information is that there was another permit that was issued October 28th, '04, and that was for new windows on the south facade, so there was exterior work that at least began in October.

CHAIRPERSON GRIFFIS: We're going to take a ten minute recess and we'll be back.

MS. BROWN: Could I ask a point of clarification?

CHAIRPERSON GRIFFIS: Sure.

MS. BROWN: Is the Motion to Dismiss on untimeliness under consideration at this point, or is that something that you will hear later?

CHAIRPERSON GRIFFIS: It's still before us and it's not under consideration in this decision.

MS. BROWN: Thank you, thank you.

CHAIRPERSON GRIFFIS: Or at this instant point. It will be our next preliminary matter.

(Whereupon, the foregoing matter went

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off the record at 2:56 p.m., and went
back on the record at 3:42 p.m.)

(Asides.)

CHAIRPERSON GRIFFIS: Okay, let's resume then. The Board has taken just a brief moment. One, to review all the information that was submitted into the record, that being, in fact, elements that were submitted today, provided the Board, and also to review the entire record that was previously submitted.

I think at this point, what I'd like to do is bring into the fold of our discussion, and therefore for deliberation, the Motion to Dismiss based on timeliness.

We have that motion in writing that was submitted. We also have the motion or the Appellant's opposition to that motion, and give the government a moment to address it if they would like to take that opportunity.

MS. BELL: Thank you, actually I haven't had an opportunity to take a look at the opposition because I was just served with that today. But I can say that I agree with the arguments that were raised in the Motion to Dismiss, and we are in agreement.

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I think it's particularly important, in light of the e-mails that were provided as part of the Applicant's packet, that indicates that he had knowledge of the construction, and about illegal or legal construction.

He at least had prior knowledge, more than the 60 days that is generally afforded under the rules with regard to bringing an appeal. And, as I said, I think there's evidence that he provided in his application packet, the earlier e-mails and some of the other letters that he provided.

I think that helps the Board make a decision that the appeal is untimely as it's filed.

CHAIRPERSON GRIFFIS: Okay, thank you very much. Mr. Crockett, I'd like to take a brief moment to respond to that, what Ms. Bell has just indicated in terms of the support of the Motion to Dismiss on timeliness, and, well, there it is.

MR. CROCKETT: Okay, as you know by now I had viewed this entire scenario in the larger context. Not just of the, whatever the Zoning Administrator did or didn't do, but what the other coordinate agencies in this matter did or didn't do.

And after the Zoning Administrator made what

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I thought was a ridiculous permit to put two little doodads on this illegal construction, it seemed clear to me that he was not going to go ahead and do anything with respect to this.

And it was at that point that I went back to the Chairman of the Historic Preservation Review Board, because I really felt that, you know, they had responsibility and they could do something about this.

And so I wrote a letter to him in January, later in January, well, first of all, I went to the ANC. And the ANC issued a Resolution calling upon the Office of Historic Preservation to require the owner to restore the thing to the status quo.

And they also recommended that penalties be imposed. That was on the tenth of January. With that in hand, I then went back to the Chairman, and wrote him on the 26th. Mr. Dennee responded to that letter, the Chairman didn't.

And I gathered from that, that when I wrote a letter to the Chairman that he would buck it down to Mr. Dennee to take care of.

He, the communications are all in your, or I hope you have the package by now. These communications are all, all in there. Now Mr. Dennee,

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at that point, told me that he'd instructed the, that there would be no occupancy permit issued unless or until the illegal construction was dismantled and replaced with a roof.

But he didn't talk about the, he didn't talk at all about the turret, restoring the turret. So I wrote him another letter with respect to the turret on February 21st, I believe.

And when he didn't respond, that's when I filed my appeal. So I believed that my appeal was timely because it wasn't until about that point that it was clear to me that nobody was going to do anything.

And I thought my appeal was timely having been filed about a month after, or less than a month after Mr. Dennee should have responded to me, but he didn't.

And the way that I view the timeliness requirement is that there has to be, there has to be a point at which you realize this is an unusual situation because it's a refusal.

It isn't somebody did something that I didn't like, it's that they didn't do anything. And so that is a very unusual situation, where you're

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complaining about somebody not doing something.

I think the point at where the time limit should come in is where it's clear that they are not going to do anything and you've exhausted all the options and remedies you had, short of filing an appeal. And that's the way I looked at it.

I was interested to see in the motion that was filed, served on me yesterday afternoon, a mention that there is a Section A which had been promulgated apparently by the Zoning Commission, which made a, it was no longer a flexible, reasonable time period but it was an actual 60-day period.

And it made me wonder why that was not in the official regulations that you can get off the web site. I had just pulled the regulations off the web site the day before, and that isn't in there.

And I don't think I should be charged with knowledge of something that hasn't even been put in the regulations that are available to the public. And that's basically it.

CHAIRPERSON GRIFFIS: Good, thank you very much. And maybe the Board appreciates the time you've put in just preparing for today, but also in all the past work leading up to today.

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Let me address the last thing first. It is a cumbersome responsibility to look at any the of the regulations, but specifically the zoning regulations as I have to do, if not more than once a week, several times a week, and to make sure that all the amended sections are also covered in my view.

Because they do not reprint them constantly, every time the Zoning Commission does a Text Amendment, which is with great frequency. However, there is an addenda to, and I believe it is also available on the web site, for further information, on all the sections that have been amended and it lists them.

And, in fact, Number 2, listed is that of 3112.2, and it's one of those sections that was added, where that time limits was added to it, which came out of a confluence of things.

One, was the Board establishing that, and also the courts establishing therefore and then the Zoning Commission writing that in. Now, it does set that threshold time, because there was never a definition of what was the appropriate amount of time or what was timely?

So it sets that threshold definition. Now

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is this Board absolutely bounded by 60 days at 12:00 midnight it expires? I would say that's where we begin in our assessment of 60 days for timeliness.

But we are also accorded the availability to look at circumstances where it would, it was not known or when the clock starts, when it was known or should have been known.

But I don't think we need to go much deeper into that aspect. I want to go then to the other points that you've brought up in this timeliness which I think will start to define the rest of our deliberation on that, and that is the refusal to take action, which is the larger foundation of the elements that you are bringing before us for appeal here.

And I think I would be persuaded to spend a great deal amount of time to look at that and to see in that section whether we had jurisdiction. If I could have been brought to, if I could have been brought a little bit further in the argument, because there's two things that I have difficulty with, and the general aspect of this is in terms of taking a look at refusal in our regulations.

One, if we start putting that in terms of timeliness or what the action actually would be,

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there's no definition. It's absolutely endless. You could keep and consistently keep saying, you know, the government would make the argument, I would project, hypothetically, the government would make an argument, well, we haven't refused yet, even though we haven't taken action.

And everyone else could come in and say, see, they obviously refused. And we could look at it in a two-day window, where they've refused to act, or we could look at into a 16-year window. So that's a very general, general aspect, in terms of that argument.

But then I go into being very specific, and that is let's look at the facts of this case. I don't see a refusal of action on all the other jurisdictions of which we wouldn't have relevancy.

But even specifically to zoning, their correspondence and lengthy correspondence with the Zoning Administrator, in fact, one of the sections dated December 29, talks about, no, not that one. I've missed the reference.

But in any case, it says the Zoning Administrator is sending out an Inspector. And Inspectors were dispatched. There is correspondence

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back and forth. There's a Stop Work put on, there's a Stop Work lifted.

There is a not a refusal to take action, there is affirmative action here and still, but still, I don't see the direct substance of the argument coming before us for appeal, or those elements that I think we would have subject jurisdiction for an appeal, have been adequately or persuasively articulated before us.

Through our initial discussions in trying to establish that, I was, I think we were all trying to get a lot more specific for that elements and it seems to all go back to one feature of the permit, and on the issuance of the permit.

And there's one direction to take to say that, okay, the issuance of the permit was to the Zoning Administrator's review was incorrectly done because it didn't, it didn't correctly issue a permit for that which was actually an expansion of a nonconforming use.

And that would have been a deliberate, that would have been an action that could be appealable. But I think it is unrefuted here, the timing of that permit, and I don't see any basis of which that would

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be timely to bring an appeal directly of that permit, nor, have I seen that articulated before us.

Let me open it up to other Board members on both of those aspects for some discussion.

VICE CHAIR MILLER: Mr. Chairman, there was filed before us a Motion to Dismiss based on timeliness and we started our hearing talking about subject matter jurisdiction.

And, in my view, there's a case for dismissal on both grounds. We spent a long time trying to figure out what, in fact, the appeal was and the conclusion that I've reached is that it was an appeal of the demolition of the turret, certainly, and then I think there was something that was mentioned with respect to stair structure.

But in any event, they're connected. And that the demolition of the turret was illegal and beyond the permit, or whatever, and that, in my view, is Number 1, construction related, and therefore not within our jurisdiction.

And Number 2, there was an awful lot of discussion and correspondence in the pleading about the historic preservation aspect of this, and that's why the appeal was being brought. And you asked him,

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well, what remedy are you seeking? And that was restoration of the roof and turret.

And, therefore, that is historic preservation and my understanding of our jurisdiction is that it does not encompass historic preservation or appeals of HPRB decisions or Old Georgetown decisions based on historic preservation.

The only possible zoning issue that was identified was the expansion of the nonconforming use and we tried to identify what action of the Zoning Administrator might be related to that to have triggered an appeal.

And the Appellant said that the triggering event was that December 28th permit. And the appeal was filed on March 25th, 2005, and the permit was issued December 28th, 2004, and that's beyond the 60 days allowed in our regulations.

And, even if we look at it to provide some kind of reasonableness to extend that time, there aren't any extenuating circumstances that I think rise to the level for us to do that.

The demolition apparently occurred in November, so that was even before this permit, so this, Appellant was on notice of what was going on, on

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the property. And as far as the refusal issue goes, I think that we have always said it has to be measured by a specific event, not a non-event.

And that the permit really is the event. And even if Appellant's are trying to discuss with the agency or work it out, they have basically 60 days to do that. It's not that the clock starts running after they're convinced that nothing more is going to happen if it's just not a measurable time that they're on notice when the triggering event occurs.

So, I think that covers it for me, as to why I don't think we have jurisdiction over this appeal.

CHAIRPERSON GRIFFIS: Okay. Any other comments, Mr. Mann?

MEMBER MANN: Yeah, I agree with the analysis and outline that Ms. Miller just talked about. And also, I just want to add that I feel like we really explored every possible way that we, you know, could see if this was timely.

And really tried to listen to all reasons why it might be, and still I think I was unconvinced and therefore have come to the same conclusion.

MR. HOOD: Mr. Chairman, I would concur with my colleagues on everything that I've heard. It

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appears to me that this record and what's been presented in front of us all points back to HPRB, and I mentioned this earlier.

I mean to issues that actually are not proper before us. Historic Preservation Review Board, the Commission on Fine Arts, Old Georgetown Board and I just have a level of being uncomfortable to be commenting or being the oversight for those particular Boards.

But I do want to make a comment on, and you've already eluded to this, Mr., I'm sorry, I forgot his name. The Appellant, Mr. Crockett, sorry, had mentioned, this has been a long night for me, I was here until about 11:00.

But, anyway, the Zoning Commission makes changes and then fortunately, like the Chair said, excuse me, that often times, you know, you don't just reprint the regs. So that's why there's an Addenda Errata Sheet.

And it's there, and not only that, we have staff which is competent. You can call and ask the staff, and that's why the staff is here, because the Zoning Commission, we make changes, we make text amendments and we do that periodically.

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And that's why there's plenty of ways to find out exactly what the current regs are, and I think that information is out there.

But again, I had a level of uncertainty and being uncomfortable early on in the process. Because when I look at the record it all points to Historic Preservation Review Board, CFA, Old Georgetown Board and others.

And I just still, unlike my colleague, Mrs. Miller, still looking for the zoning issue here, and that's just where I am. And as far as, it looks as though you knew early on in the process from a time, because I think alluded to the e-mails that you were up on your roof doing something, and I think you mentioned it might affect your guard and other things that you mentioned, and I didn't have a chance to read it fully.

But I think as for the timeliness, there was plenty of time to file. So that's where I am.

CHAIRPERSON GRIFFIS: Thank you very much. Others?

(No response.)

CHAIRPERSON GRIFFIS: Very well. Mr. Crockett, I'll give you one opportunity to address the

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Board if you feel you need. After that, of course, we would go into our motion on the elements before us?

MR. CROCKETT: Well, I thank you, Mr. Griffis, I think it's clear what the Board's thinking and position on this is, and I am in no position, on a situation like this, where I'm not an expert, to disagree with you.

It did seem fairly clear to me in reading your authorizing language that you, it was broad enough, that it would cover the failure to enforce any of this. I mean it's a pretty broad statute.

And I didn't realize that you had construed it so narrowly and I'm unaware of where else one might go to get the relief that's necessary, if it isn't here.

And I'm sorry that it isn't here. So with that, I thank you for your attention.

CHAIRPERSON GRIFFIS: Thank you, Mr. Crockett and members of the Board sympathizes and perhaps even empathizes for the situation of having the difficulty of several things, but specifically that which is the correct process in which to take.

At this time I would move that we uphold the Motion to Dismiss based on timeliness and also

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attached to my motion, dismissal based on lack of subject jurisdiction, and would ask for a second.

VICE CHAIR MILLER: Second.

CHAIRPERSON GRIFFIS: Thank you, Ms. Miller.

Let me go to, and I think it's probably most appropriate to frame my deliberation very expeditiously because we've had a large amount of it, but frame it around that which the Appellant put forth their appeal.

And I would look to their Exhibit Number 2 to begin with and I will cite some other of the documentation. But the first basis, the request for relief in the basis of the Appellant as stated is three elements.

The first is that there is a failure and refusal to enforce either 2002.3, the zoning regulations, or DC Code 611.06, and the require developer to restore an unlawfully demolished turret, and dismantle the unlawful roof structure.

At this juncture, I think we've seen that the failure or refusal to enforce 2002.3, still takes a secondary step of what is that action? Just to say that that wasn't, the failure to enforce, there needs to be a more illustrative idea of how is that failure

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evidenced.

And now, as I said earlier, if there was a total lack of any attention or action or notion, I think that we'd be in a different position. But here we have before us, in fact, Stop Work Orders, communication with the Zoning Administrator, we have Inspectors on site, we have removal of Stop Work Orders, and we have issuance of permits.

All of which go to me to I tend to side on the fact that that is upholding or enforcement of the zoning regulations, because that is the process of which those regulations are upheld or enforced.

One, issuance of permits, review documents, issuance of permits and inspections of fines and/or Stop Work Orders. All of which seem to be elements happening in this case.

In terms of DC Code Section 611.06, several of us, if not all of us, were very unfamiliar with that citing and in our recess did pull that up. It does go towards historic preservation and elements within historic preservations.

I am not aware, nor has anything been presented today, or even in my memory and now pulling up some other resources of past cases, of which we've

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had this, seeing any way that we could step into the shoes of an appeal body of the DC Code and historic preservation, let alone subdivision or reviews of subdivisions, etcetera.

Now 11.06 was cited, but I believe 11.04, 11.05, all different sections. For me the second aspect be to find that DCRA exceeded its authority in issuing a permit for minor modifications of the unlawful structures on December 28, 2004.

There's two elements of this. One is, well, actually all of them are encompassed in the fact that if that was the basis, without getting into the merits of the appeal, the basis of appealing the permit, it is very clear the date of 28 December, 2004, that the timing is not set aside for timeliness of bringing an appeal by other actions or communications.

That action has to be taken to bring a timely appeal to us. Meaning you can't go out and hope that you're overturning it with persuasive arguments with DCRA or the ANC or anybody else, rather you have to set your place, once you know that something or believe something incorrect had happened, that the appeal should be brought based on that.

And lastly, that see, it goes again to the

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remedy more so, the remedy of what's happening, and that is to rebuilding that which was changed or altered on the structure.

And again, it was cited more of the preservation or design aspects. Now certainly design aspects are part and parcel of the zoning regulations, and where we have design jurisdiction the regulations are very clear on that and set that up.

And it is often in special exception, special exception reviews of which we would look to character elements or lighting, screening, materials, and we do take that under great consideration when we have that.

Lastly, looking further, even into the Appellant's opposition to the motion on timeliness, I noted in looking through there was an awful lot of talk again of dates with the Historic Preservation staff member.

And the last sentence on Page 6 of our exhibit, I'm not sure what exhibit it's going to be, as it came in today, but the last exhibit in this case.

It says after DCRA's ultimate refusal to act or even respond within a reasonable time to the

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February 21, 2005, letter, Appellants filed a timely appeal from this refusal on March 25, 2005.

Now, again, I absolutely understand the frustration of not knowing how to get someone to act or how then to go to an authority to appeal the action or inaction, but those dates are specifically tied to that discussion with Mr. Dennee, which is a Historic Preservation staffer and is based on elements that are clearly within their jurisdictional review.

And also don't rise any specific zoning elements that I was, that were persuasive enough for me to say that we actually could step into the jurisdiction of that review.

I'll end my comments at this time with that and open it up to others. Ms. Miller.

VICE CHAIR MILLER: I just have two brief comments. One is that the Appellant did cite 6-1106, so it seems to me that the Appellant should have noticed in 6-1103, the powers of the Historic Preservation Review Board.

And they also get in, in this chapter, into judicial review, etcetera, and it doesn't say anything, as far as I know, I haven't read every single word, just looking at it this afternoon, but

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I'm sure it doesn't, anything about any appeals to the Zoning Board of decisions or refusals to take actions.

And the other thing I just want to say that when we're talking about the question of timeliness or subject matter jurisdiction, it's not something that's really within our jurisdiction.

If we look at the facts and the law and find out that it was either untimely or that another body has jurisdiction, we don't have discretion to say, well, we're going to, let's just take it anyway, because of some, you know, reason where we think it might, it be beneficial to someone.

We can't do that. We don't have discretion.

We have discretion in some areas, but not in jurisdictional questions.

CHAIRPERSON GRIFFIS: Good, anything else?

MR. HOOD: I would just say, Mr. Chairman, as far as the response, as far as the responses, it looks like most of the people, Mr. Crockett, that you, the former Director of DCRA, excuse me, Timothy Dennee, Tony Chair, you had a pretty good response.

And I'm not trying to throw any slashes or say anything against DCRA, but it looks like they were very accommodating. And it looks also like you've

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done a lot of work, so I don't want that to go unnoticed, I do know that you've done a lot of work.

It's just that as far as I'm concerned and what you're hearing, it's not in our jurisdiction.

CHAIRPERSON GRIFFIS: Very well, is there any other deliberation? Comments?

(No response.)

CHAIRPERSON GRIFFIS: Okay. IN that case, we do have a motion before us. It has been seconded. I would ask for all those in favor of the motion signify by saying aye?

(A chorus of ayes.)

CHAIRPERSON GRIFFIS: And opposed?

(No response.)

CHAIRPERSON GRIFFIS: Abstaining?

(No response.)

CHAIRPERSON GRIFFIS: Very well, why don't we record the vote.

MS. BAILEY: Mr. Chairman, the Board upheld the property owners motion to dismiss the appeal and the Board added that it should be dismissed based on subject matter jurisdiction.

The vote is 4-0-1. The motion was made by Mr. Griffis, seconded by Mrs. Miller, Mr. Mann and Mr.

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Hood are in agreement. Board member Etherly is not present at this time.

CHAIRPERSON GRIFFIS: Okay, well, thank you very much Mrs. Bailey. We appreciate everyone's time and attention to this matter and let me ask, Ms. Bailey, do we have any other business for the Board in this afternoon session?

MS. BAILEY: No, Mr. Chairman.

CHAIRPERSON GRIFFIS: Very well, if there's nothing further for the Board let us adjourn the afternoon session of the 12th of July.

(Whereupon, the proceedings in the above-entitled matter were concluded at 4:14 p.m.)

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